(27)

No. 95-388-CFX
Status: GRANTED

Title: Antony Brown, et al., Petitioners
v.
Pro Football, Inc., dba Washington Redskins, et al.

Docketed:
September 11, 1995

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Starr,Kenneth W.

Counsel for respondent: Levy,Gregg H.

Confirmed with counsel that there are only two docket numbers below. Ptn due 9-10-95, Sunday, rcd 9-11-95.

Entry	Date	Note	Proceedings and Orders
1	Sep 11 1995	G	Petition for writ of certiorari filed.
3	Sep 28 1995		Order extending time to file response to petition until November 10, 1995.
4	Oct 11 1995		Brief amicus curiae of United States filed. VIDED.
6	Oct 31 1995		Request for further extension of time to file response to petition denied by the Chief Justice.
7	Nov 9 1995	G	Motion of Screen Actors Guild, Inc., et al. for leave to file a brief as amici curiae filed.
8	Nov 13 1995	G	Motion of Major League Baseball Players Association for leave to file a brief as amicus curiae filed.
9	Nov 13 1995		Brief of respondents Pro Football, Inc., et al. in opposition filed.
10	Nov 13 1995	G	Motion of National Hockey League Players, et al. for leave to file a brief as amici curiae filed.
11	Nov 17 1995		Reply brief of petitioners filed.
12	Nov 21 1995		DISTRIBUTED. December 8, 1995 (Page 1)
13	Dec 8 1995		Motion of Screen Actors Guild, Inc., et al. for leave to file a brief as amici curiae GRANTED.
14	Dec 8 1995		Motion of Major League Baseball Players Association for leave to file a brief as amicus curiae GRANTED.
15	Dec 8 1995		Motion of National Hockey League Players, et al. for leave to file a brief as amici curiae GRANTED.
16	Dec 8 1995		Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 19, 1996. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 16, 1996. Rule 29.2 does not apply.
			**********
19	Jan 18 1996	G	Motion of Screen Actors Guild, Inc., et al. for leave to file a brief as amici curiae filed.
17	Jan 19 1996		Joint appendix filed.
18	Jan 19 1996		Brief of petitioners Antony Brown, et al. filed.
20	Jan 19 1996		Brief amici curiae of United States and the Federal Trade Commission filed.
21	Jan 19 1996	G	Motion of National Hockey League Players Association, et al. for leave to file a brief as amici curiae filed.
22	Jan 24 1996		SET FOR ARGUMENT WEDNESDAY, MARCH 27, 1996. (1ST CASE).

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No. 95-388-CFX

Entry	Date	Note	Proceedings and Orders
23	Jan 29 1996		CIRCULATED.
24	Feb 2 1996	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
25	Feb 13 1996		Record filed.
		*	Original record proceedings United States District Courtfor the District of Columbia-11 BOXES,4 SEALED ENVELOPES
26	Feb 14 1996		Record filed.
		*	Partial record proceedings United States Court of Appeals for the District of Columbia Circuit (BOX).
27	Feb 15 1996	X	Brief amicus curiae of Alliance of Motion Picture and Television Producers filed.
31	Feb 16 1996	X	Brief of respondents Pro Football, Inc., et al. filed.
32	Feb 16 1996		Brief amicus curiae of National Basketball Association filed.
33	Feb 16 1996	X	Brief amici curiae of League of Voluntary Hospital and Homes of New York, et al. filed.
34	Feb 16 1996	X	Brief amici curiae of Bituminous Coal Operators' Association, Inc., et al. filed.
35	Feb 16 1996	X	Brief amicus curiae of American Trucking Associations filed.
36	Feb 16 1996	X	Brief amicus curiae of National Electrical Contractors Association, Inc. filed.
37	Feb 16 1996	X	Brief amici curiae of Carriers Container Council, Inc., et al. filed.
38	Feb 16 1996	X	Brief amicus curiae of Associated General Contractors of America, Inc. filed.
39	Feb 16 1996	X	Brief amicus curiae of National Railway Labor Conference filed.
40	Feb 16 1996	X	Brief amici curiae of Commissioner of Baseball, et al. filed.
41	Feb 16 1996	X	Brief amicus curiae of National Hockey League filed.
42	Feb 16 1996	X	Brief amici curiae of Chamber of Commerce of the United States, et al. filed.
28	Feb 20 1996		Motion of Screen Actors Guild, Inc., et al. for leave to file a brief as amici curiae GRANTED.
29	Feb 20 1996		Motion of National Hockey League Players Association, et al. for leave to file a brief as amici curiae GRANTED.
30	Feb 20 1996		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
43	Mar 11 1996	X	Reply brief of petitioners filed.
44	Mar 27 1996		ARGUED.
45	Mar 28 1996		Letter from counsel for the petitioners including a letter dated March 25, 1996 from William B. Gould, Chairman of NLRB to Deputy Solicitor Lawrence Wallace received and distributed.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,
Petitioners,
v.

PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the nonstatutory labor exemption to the antitrust laws immunizes from antitrust scrutiny all concerted restraints on competition for the services of unionized employees that are unilaterally imposed by a multiemployer cartel after the employers and the union have reached impasse in collective bargaining, so that employees must forego the benefits of collective bargaining to challenge such restraints under the antitrust laws.

PARTIES TO THE PROCEEDING

Petitioners are a class of professional football players who played on developmental practice squads of the 28 teams of the National Football League during the 1989 season. The named petitioners are Antony Brown, James Bishop, John Buddenberg, Gary Couch, Craig Davis, Ricky Andrews, Thom Kaumeyer, Wesley Pritchett and John Simpson, who were named plaintiffs in Civil Action No. 90-1071, a class action brought in the United States District Court for the District of Columbia. Petitioners were appellees in the Court of Appeals.

Respondents, defendants-appellants below, are Pro-Football, Inc., d/b/a Washington Redskins; the Five Smiths, Inc., d/b/a Atlanta Falcons; Buffalo Bills, Inc., d/b/a Buffalo Bills; Chicago Bears Football Club, Inc., d/b/a Chicago Bears; Cincinnati Bengals, Inc., d/b/a Cincinnati Bengals; Cleveland Browns, Inc., d/b/a Cleveland Browns; Dallas Cowboys Football Club, Ltd., d/b/a Dallas Cowboys; PDB Sports, Ltd., d/b/a Denver Broncos; the Detroit Lions, Inc., d/b/a Detroit Lions; Green Bay Packers, Inc., d/b/a Green Bay Packers; Houston Oilers, Inc., d/b/a Houston Oilers; Indianapolis Colts, Inc., d/b/a Indianapolis Colts; Kansas City Chiefs Football Club, Inc., d/b/a Kansas City Chiefs; Los Angeles Raiders, Ltd., d/b/a Los Angeles Raiders; Los Angeles Rams Football Company, Inc., d/b/a Los Angeles Rams; Miami Dolphins, Ltd., d/b/a Miami Dolphins; Minnesota Vikings Football Club, Inc., d/b/a Minnesota Vikings; KMS Patriots, L.P., d/b/a New England Patriots; the New Orleans Louisiana Saints Limited Partnership, d/b/a New Orleans Saints; New York Football Giants, Inc., d/b/a New York Giants; New York Jets Football Club, Inc., d/b/a New York Jets; the Philadelphia Eagles Football Club, Inc., d/b/a Philadelphia Eagles; B & B Holdings, Inc., d/b/a Phoenix Cardinals; Pittsburgh Steelers Sports, Inc., d/b/a Pittsburgh Steelers; the Chargers Football Company, d/b/a San Diego Chargers; the San Francisco Forty-Niners, Ltd., d/b/a San Francisco Forty-Niners; the

Seattle Professional Football Club, d/b/a Seattle Seahawks; Tampa Bay Area NFL Football, Inc., d/b/a Tampa Bay Buccaneers, Inc.; and the National Football League.

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Roger D. Blair & Jeffrey L. Harrison, *Monopsony* (1993) 6
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PETITION FOR WRIT OF CERTIORARI

Petitioners Antony Brown, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding.

OPINIONS BELOW

The Court of Appeals' opinion is reported at 50 F.3d 1041 (D.C. Cir. 1995) and reprinted in the appendix ("App.") to this petition at pages 1a-60a. The Court of Appeals orders denying petitioners' petition for rehearing and suggestion for rehearing *in banc* are reprinted at App. 61a-63a. The D.C. Circuit's opinion reversed a memorandum opinion and order of the United States District Court for the District of Columbia granting petitioners' motion to strike respondents' nonstatutory labor exemption defense. The District Court's decision is reported at 782 F. Supp. 125 (D.D.C. 1991) and reprinted at App. 64a-92a. The District Court's subsequent decision granting petitioners' motion for summary judgment on liability, which is not directly at issue in this petition, is reported at 1992-1 Trade Cas. (CCH) ¶ 69,747 (D.D.C. 1992) and reprinted at App. 93a-115a.

JURISDICTION

The Court of Appeals issued its opinion on March 21, 1995. App. 1a. Petitioners filed a timely petition for rehearing, which the Court of Appeals denied on June 12, 1995. App. 61a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157, provides in pertinent part:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

STATEMENT OF THE CASE

This closely watched case goes to the heart of the fundamental interplay between the federal labor laws and the antitrust laws—an interplay critical to labor relations and competition for labor services in every American industry characterized by multi-employer bargaining, most particularly the professional sports and entertainment industries where unions are often organized to *preserve* competition among employers for the services of highly talented athletes and entertainers. The issues presented are also of great public importance to the federal government's ability to enforce and harmonize these two paramount statutory charters in commercial fields involving millions of employees.

A. Overview

In this class action suit, petitioners—a class of professional football players called "developmental squad" players—claim that respondents the National Football League ("NFL") and its 28 member clubs violated § 1 of the Sherman Act by agreeing among themselves to impose a league-wide uniform salary on petitioners. The fixed sal-

ary had never been part of any collective bargaining agreement with the players; the regime was unilaterally imposed without the consent of the players' union, the NFL Players Association, after the NFL and the Players Association had reached impasse over the issue.[1] Although the players have never consented to any fixed salary in the course of collective bargaining with the NFL, respondents nevertheless interposed the defense of the nonstatutory labor exemption to the antitrust laws.

The nonstatutory labor exemption is entirely a judicial construct that was developed by this Court in a series of decisions from 1945 to 1975.[2] The exemption is necessary to harmonize the Sherman Act's policy favoring free competition with the NLRA's policy favoring collective bargaining agreements. This Court has held that "a proper accommodation" between these two congressional policies "requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." *Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 622 (1975).

In a sweeping opinion of far-reaching consequence, a divided panel of the Court of Appeals dramatically expanded the scope of the nonstatutory labor exemption to create, in the words of the United States (participating as amicus curiae in support of rehearing below), a wholly "new construct" contrary to the "well-established body of precedent" developed by this Court and other courts of appeals, including the Sixth and Eighth Circuits. App.

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[1] "Impasse" means "that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless." *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988) (internal quotation marks omitted).

[2] *Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616 (1975); *Local No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Allen Bradley Co. v. Electrical Workers*, 325 U.S. 797 (1945).

120a, 121a n.3.[3] The Court of Appeals held that once a collective bargaining relationship exists between a group of employers and a union, the antitrust laws have no further application whatsoever to any concerted restraints on competition imposed by the employers that primarily affect the labor market—that the antitrust laws, in other words, are entirely *ousted* by the collective bargaining process. *See id.* 29a; *id.* at 41a, 45a (Wald, J., dissenting).

Five years ago, in *Powell v. NFL*, No. 89-1421 (Oct. Term 1990), *cert. denied*, 498 U.S. 1040 (1991), this Court invited the Solicitor General to express the views of the United States on a petition for certiorari to the Eighth Circuit that raised a closely related question—whether the NFL could claim the protection of the non-statutory labor exemption when, after bargaining to impasse with the Players Association, the NFL unilaterally imposed on the players an industry-wide employment restriction that *had* been included in the parties' prior, expired collective bargaining agreement. Noting that no conflict then existed in the circuits and that the issue in *Powell* was "one on which additional experience in the lower courts could shed light," the United States nevertheless recommended that the Court grant review at that time because, in the view of the United States, the Eighth Circuit had committed an error of "serious consequence" and the question was "of sufficient importance to the proper functioning of the labor and antitrust laws, and to the maintenance of industrial peace," to merit immediate review. Brief for United States as Amicus Curiae 17-19, *Powell v. NFL*, No. 89-1421 (Oct. Term 1990) (U.S. filed Dec. 1990).

The Court now has the benefit of five additional years of percolation in the lower courts, including the thorough analysis of the District Court and the majority and dissenting opinions of the Court of Appeals in this case. With the Court of Appeals' opinion below and the Second

[3] The Brief for the United States as Amicus Curiae in Support of Petition for Rehearing, in *Brown v. Pro Football, Inc.*, No. 93-7165 (D.C. Cir. filed May 5, 1995), is reprinted at App. 116a-126a.

Circuit's recent opinion in *National Basketball Ass'n ("NBA") v. Williams*, 45 F.3d 684 (2d Cir. 1995), *pet. for cert. pending*, No. 95-137 (U.S. filed July 24, 1995), a clear division among the circuits has now emerged with respect to the nature and scope of the nonstatutory labor exemption. At least four circuits, led by the Sixth and Eighth Circuits, stand on one side of the conflict—emphasizing labor-management agreement as the operative test for the nonstatutory exemption—with the Second and D.C. Circuits on the other side—holding immune from antitrust review any multi-employer labor restrictions imposed once collective bargaining has begun, regardless of union consent.

These vitally important questions that have produced instability and conflict in the lower courts are now fully sharpened for the Court's review, and this case provides the best possible vehicle for resolution of the conflict. As Judge Tatel stated below: "This case presents antitrust and labor issues of national significance. The issues have been fully engaged and developed by the majority and dissenting opinions. Supreme Court review is essential to the resolution of these issues. *See* Sup. Ct. R. 10.1(c)." App. 63a (Tatel, J., concurring in denial of rehearing *in banc*). *See ibid.* (Wald, J., dissenting from denial of rehearing *in banc*) (this case "merits final resolution by the Supreme Court").[4]

B. Statement of Facts

The 28 respondent NFL clubs are direct competitors for the services of top-level professional football players. Together, respondents exercise monopoly power over the market for the services of the top-level players, since the players have no comparable alternative buyers for their

[4] Petitioners in *Williams* have suggested that because of the similarity of issues between the two cases, the Court consider the present petition together with the *Williams* petition. *See* Pet. for Cert. 3 n.5, *Williams v. NBA*, No. 95-137 (U.S. filed July 24, 1995). Petitioners agree.

uniquely valuable athletic talents if the NFL clubs collude to depress the price they will pay for players' services.[5]

Largely to counteract respondents' power and incentive to restrict competition for players' services and depress salaries through collusion, the players organized the Players Association, the exclusive bargaining representative for all NFL players, including petitioners. As long as the players have been represented in collective bargaining by the Players Association, every player's compensation has been determined through individual negotiation between each player and his team, subject only to certain minimum salary levels set forth, when applicable, in a collective bargaining agreement. The Players Association has never consented to a fixed regular season salary for any category of NFL player at any time in the course of collective bargaining with respondents.

In early 1989, when no collective bargaining agreement was in effect,[6] respondents adopted an amendment to the NFL Constitution, known as Resolution G-2, which created a new category of player—the developmental squad player. Developmental squad players would act as practice players in scrimmages with the clubs' active roster players and would be allowed to suit up and play in NFL games as replacements for active players. Under Resolution G-2, respondents agreed among themselves to limit the number of developmental squad players to six per club and to establish a league-wide fixed salary for their services.

---

[5] In economic terms, respondents have monopsony power in the market for the services of top-level professional football players. *See* Roger D. Blair & Jeffrey L. Harrison, *Monopsony* 72 (1993); Richard A. Posner & Frank H. Easterbrook, *Antitrust* 150 (1981); App. 39a-41a (Wald, J., dissenting). Respondents admitted in their answer to petitioners' complaint that they exercise such monopsony power, a point also acknowledged by respondents' expert at trial.

[6] A 1982 collective bargaining agreement had expired in 1987. No successor agreement was reached until 1993, several years after the events at issue. *See infra* note 14.

In subsequent bargaining with the Players Association, respondents proposed to pay all developmental squad players a fixed salary of $1,000 per week during the 1989 NFL season. Respondents "frankly admitted they wanted a $1,000 fixed salary for developmental squad players to save money." App. 57a-58a (Wald, J., dissenting); *see id.* at 98a. In prior seasons, the salaries for such practice players had been set through individual negotiations. Those salaries had averaged, in the 1988 season, just under $4,000 per week.

Consistent with its unwavering policy of insisting on the right of all players to negotiate their compensation individually, the Players Association refused to agree to the proposed $1,000 fixed salary. Respondents declared an impasse in bargaining over the salaries of developmental players and unilaterally imposed the $1,000 per week fixed salary. Respondents' concerted imposition of the fixed salary was enforced by the NFL, which promised disciplinary action, including loss of future draft picks, against any club that paid any developmental squad player any compensation or benefits other than the flat $1,000 per week fixed salary. App. 7a; *id.* at 67a.

C. District Court Proceedings

1. The named petitioners filed this action on May 9, 1990, on behalf of themselves and a certified class of 235 developmental squad players employed during the 1989 NFL season. Petitioners claimed that respondents' concerted imposition of the $1,000 per week fixed salary was an unreasonable restraint of trade in violation of § 1 of the Sherman Act.[7] Respondents invoked the nonstatutory labor exemption as a defense, and the parties filed cross-motions for summary judgment on the applicability of the defense.

2. On June 4, 1991, the District Court (Lamberth, J.) granted petitioners' motion to strike the nonstatutory

[7] Shortly after petitioners filed suit, respondents discontinued the fixed-salary developmental squads.

labor exemption defense and denied respondents' cross-motion. App. 64a-92a. Disagreeing with *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), the District Court ruled, first, that the nonstatutory labor exemption had expired with the expiration of the parties' prior collective bargaining agreement in 1987. App. 72a-80a. The court reasoned that extending the exemption past the end of a bargaining agreement would not accommodate but would actually contravene federal labor policy. *Id.* at 75a-79a. In the alternative, the District Court concluded that the nonstatutory labor exemption could in no event extend beyond impasse. *Id.* at 80a-86a. A contrary rule, in the court's view, would create a perverse incentive for employers to "feign or force impasse," *id.* at 83a, and would allow them to achieve their pre-impasse proposals "without having to make any compromises or resort to the economic forces which are part of the collective bargaining process." *Id.* at 84a. Finally, the court also concluded that the concerted implementation of the fixed salary could not be shielded because the Players Association had never at any point in collective bargaining agreed to the fixed salary. *Id.* at 86a-90a (relying on, *inter alia*, *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977)).

3. In a subsequent opinion, the District Court granted summary judgment for petitioners on the issue of antitrust liability. App. 93a-115a. The court found that respondents' concerted implementation of the fixed salary failed rule-of-reason analysis under § 1 because it was "significantly anticompetitive in its effect," *id.* at 111a, and lacked any relevant procompetitive justification. *Id.* at 110a-114a.

4. The case proceeded to a jury trial on damages. Based on evidence that developmental squad players would have earned an average of $5,189 per week during the 1989 season if not for respondents' elimination of competitive salary negotiations, the jury found aggregated

damages for the class in the amount of $10,116,547.[8] The District Court trebled the award pursuant to § 4 of the Clayton Act and entered a judgment against respondents of $30,349,642. 1993 Trade Cas. (CCH) ¶ 70,260 (D.D.C. 1993).

D. The Court of Appeals' Decision

1. A divided panel of the Court of Appeals reversed on the basis of the labor exemption. App. 1a-60a. Writing for the majority, Chief Judge Edwards held that "the nonstatutory labor exemption shields from antitrust challenge alleged restraints on competition imposed through the collective bargaining process, so long as the challenged actions are lawful under the labor laws and primarily affect only a labor market organized around a collective bargaining relationship." *Id.* at 10a.

a. Although acknowledging that this Court has recognized only a narrow nonstatutory exemption for "some union-employer agreements" and only where strictly necessary to achieve "a proper accommodation between the congressional policy favoring collective bargaining . . . and the congressional policy favoring free competition in business markets," *Connell*, 421 U.S. at 622, *quoted at* App. 11a, the majority nevertheless disagreed with those courts of appeals, including the Eighth Circuit in *Mackey v. NFL*, *supra*, that have limited the exemption's reach to subjects of labor-management agreement. App. 10a-17a. Instead, the majority reasoned that the exemption must be broad enough in scope to shield the entire collective bargaining process, not just agreements resulting from that process, and should apply whenever the alleged restraint on competition operates primarily in the labor market, as opposed to the product market. *Id.* at 16a.

b. In the majority's view, the process of collective bargaining under the NLRA presumes that labor and management will have "roughly equal power" to resort to

[8] Indeed, the respondent clubs admitted that as a result of the fixed salary, they reduced their payroll costs in 1989 by more than $12 million.

economic pressure tactics with minimal government intervention. *Id.* at 19a; *see id.* at 17a-19a. Since an employer does not violate the NLRA by making unilateral changes in employment terms upon impasse as long as those terms were proposed to the union in pre-impasse bargaining, *id.* at 18a, the court concluded that to "preserve the delicate balance of countervailing power that characterizes the process," antitrust can have no application to such unilateral changes. *Id.* at 19a-20a. "Injecting the Sherman Act into the collective bargaining process," the majority believed, "would disrupt this balance by giving unions a powerful new weapon, one not contemplated by the federal labor laws." *Id.* at 20a.

c. Although the majority recognized the general rule, well-established in this Court's decisions, that the Sherman Act applies to restraints on labor markets as well as product markets, *id.* at 24a (citing *Radovich v. NFL*, 352 U.S. 445, 449-52 (1957)), "the inception of a collective bargaining relationship," in the court's view, "irrevocably alters the governing legal regime," App. 24a, and from that point onward the Sherman Act "necessarily is replaced by the NLRA paradigm of organized negotiation." *Id.* at 25a. Ultimately, the court concluded, employees must "choose whether to invoke the protections of the NLRA or the Sherman Act." *Id.* at 30a. "If employees wish to seek the protections of the Sherman Act, they may forego unionization or even decertify their unions." *Ibid.*

2. In dissent, Judge Wald criticized the majority for adopting "[a] rule that ousts antitrust law only to encourage fewer collective bargaining agreements" and that is thus "contrary to the purposes of *both* the labor laws and the antitrust laws." App. 49a (emphasis in original).

a. Judge Wald explained, first, that under settled case law the antitrust laws apply to multi-employer restraints on labor markets. *Id.* at 35a-41a. *See id.* at 37a-38a (citing, *inter alia*, *Anderson v. Shipowners' Ass'n*, 272 U.S. 359 (1926) (holding industry-wide agreement setting uniform terms and conditions of employment for seamen

subject to antitrust scrutiny); 2 Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶¶ 338b & 338c (1978)). Where employers enjoy monopsony power over the labor market, as the NFL clubs admittedly do, concerted wage restraints will eventually degrade the quality of the product and harm consumers. App. 40a-41a. Antitrust has an important role in addressing such anticompetitive labor restraints, and "[t]hat role should be ousted only as necessary to implement clear congressional directives." *Id.* at 41a.

b. Judge Wald saw no such clear directive in the nonstatutory labor exemption decisions from this Court, all of which emphasize the exemption's limited purpose of accommodating antitrust to the labor policy favoring labor-management *agreement* through collective bargaining. *Id.* at 41a-45a. And, she observed, there is a lack of clarity in the lower courts, with the courts of appeals divided on the issue. *Id.* at 44a-45a.

c. She strongly disagreed with the majority's assessment that application of the antitrust laws would somehow upset the balance of power between unions and employers. *Id.* at 45a-50a. To the contrary, Judge Wald reasoned, the majority's rule "decisively tips the balance by giving employers important *new* rights, together with new incentives to harden their bargaining positions," letting multi-employer groups "unilaterally impose labor market restraints that heretofore might have exposed them to antitrust liability." *Id.* at 46a (emphasis in original). For example, the anticompetitive scheme condemned by this Court in *Anderson v. Shipowners' Ass'n, supra,* would now "be exempt from antitrust scrutiny" provided only the scheme were proposed in collective bargaining and implemented after impasse. App. 49a-50a. On the employees' side, the panel's opinion will discourage collective bargaining completely and lead to union decertification, the very opposite of the NLRA's goal of encouraging "'constructive, open discussions leading, it was hoped, to mutual agreement.'" *Id.* at 48a-49a (quoting *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970)).

d. Finally, Judge Wald reasoned that the majority had seriously confused bargaining "tactics" by employers (such as lockouts and striker replacement) with the unilateral imposition of "terms" of employment. App. 50a-58a. The employers' right unilaterally to impose terms after impasse is best understood *not* as a bargaining tactic protected against interference by the NLRA but as part of the employers' *residual right* to operate their businesses once the statutory duty to bargain has been exhausted. *Id.* at 51a. Employment terms unilaterally imposed at impasse merely serve the employers' own business interests and are "a substitute for an agreement, not a means of reaching one." *Id.* at 54a. After impasse, just as before the inception of collective bargaining, the exercise of the employers' "residual right" is subject to the "backdrop" of preexisting rights and obligations, including the federal antitrust laws. *Id.* at 54a-57a. The dissent explained how this Court's cases applying the doctrine of implied preemption under the NLRA demonstrate the point. *Id.* at 54a-57a (discussing, *inter alia, Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), and *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987)). Judge Wald concluded that the preemption "principles" of these cases apply as well to the nonstatutory labor exemption. App. 57a.

3. Petitioners sought rehearing of the panel's decision, and the United States (represented by the Assistant Attorney General for the Antitrust Division) took the highly unusual step of filing a brief as amicus curiae in support of rehearing. *Id.* at 116a-126a. In its brief, the United States argued that "[t]he sweeping antitrust immunity adopted by the majority has no support in Supreme Court precedent" and "weakens both antitrust and labor policy." *Id.* at 119a. The United States pointed out that the test applied by the Eighth and Sixth Circuits, focusing on labor-management agreement, represents "established law" and that the panel's decision here "creates a new, far broader implied antitrust immunity" that cannot be squared with the decisions of the other circuits. *Id.* at

121a. In the view of the United States, the panel's decision also conflicted with this Court's precedents forbidding expansion of implied antitrust exemptions except when there is a clear repugnancy between the antitrust laws and the regulatory system and even then only to the minimum extent necessary. *Id.* at 122a.

As noted earlier, Judge Tatel, in addition to Judge Wald, filed a statement expressing his view that "Supreme Court review is essential to the resolution of these issues." *Id.* at 63a.

REASONS FOR GRANTING THE WRIT

This case satisfies virtually all traditional criteria for the exercise of the Court's certiorari jurisdiction. *See* Sup. Ct. R. 10.1. There is a conflict among the courts of appeals over a purely legal question involving the relationship between two premier federal statutes. The reasoning in the Court of Appeals' opinion also conflicts with prior decisions of this Court in at least two significant respects. Moreover, the issues presented are of manifest importance, both to the antitrust laws and to the labor laws, a fact underscored by the unusually active interest the United States has taken in this case. If left unreviewed, the Court of Appeals' decision promises to undermine both statutory regimes and inevitably spawn greater instability in the lower courts.

Five years ago, in *Powell v. NFL*, the United States urged the Court to review issues similar to those presented here, even before the circuits were in conflict. This time around, with owner-player relations thrown into a state of legal uncertainty throughout professional sports and the lower courts divided, the issues are plainly ripe for Supreme Court resolution. This case presents the proper opportunity.

I. THE COURTS OF APPEALS ARE SHARPLY DIVIDED OVER THE NATURE AND SCOPE OF THE NONSTATUTORY LABOR EXEMPTION TO THE ANTITRUST LAWS, AND THE IMPORTANT ISSUES PRESENTED ARE RIPE FOR RESOLUTION BY THIS COURT.

There is a clear split among the courts of appeals over the operative test for applying the nonstatutory labor exemption. The Fifth, Sixth, Eighth and Ninth Circuits apply a test—derived directly from this Court's precedents—that turns on whether, at some point in bona fide bargaining between the union and the employers, the union has agreed to the challenged term or condition. The blanket exemption now crafted by the D.C. Circuit here and the Second Circuit in *NBA v. Williams* is wholly and explicitly detached from the notion of labor-management agreement. This bold rule represents a radical departure from the established test applied by the other circuits, as the United States argued in support of rehearing.

A. The derivation of the nonstatutory labor exemption by this Court and its established application in the lower courts demonstrate the importance of the pivotal element of labor-management agreement.

The nonstatutory labor exemption represents a narrow judicial extension of the statutory exemption for union activities contained in §§ 6 and 20 of the Clayton Act, 15 U.S.C. § 17, 29 U.S.C. § 52, and several provisions of the Norris-LaGuardia Act, 29 U.S.C. § 104 *et seq.* *See Connell*, 421 U.S. at 621-22. The exemption is based on the "strong labor policy favoring the association of employees to eliminate competition over wages and working conditions" and is necessary because the statutory protections enacted by Congress apply only to unilateral actions by unions and not to "agreements between unions and nonlabor parties," including even collective bargaining agreements. *Id.* at 622. *See also United Mine Workers v. Pennington*, 381 U.S. 657, 662 (1965); *United States v. Hutcheson*, 312 U.S. 219, 232 (1941).

In creating the nonstatutory labor exemption, this Court has been careful to explain that its narrow purpose is to "accommodat[e]" the NLRA policy favoring collective bargaining and the competing requirements of the antitrust laws where such accommodation is "require[d]." *Connell*, 421 U.S. at 622. Consistent with the limited purpose of "harmonizing," *Pennington*, 381 U.S. at 665, the labor and antitrust laws, the Court has held only that "some *union-employer agreements*" must be accorded "limited" protection from antitrust sanctions. *Connell*, 421 U.S. at 622 (emphasis added). *See Local No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965) (opinion of White, J.) ("Employers and unions are required to bargain about wages, hours, and working conditions, and this fact weighs heavily in favor of antitrust exemption for *agreements* on these subjects.") (emphasis added); *id.* at 711-12 (opinion of Goldberg, J.) ("To tell the parties that they must bargain about a point but may be subject to antitrust penalties if they *reach an agreement* is to stultify the congressional scheme.") (emphasis added).

The emphasis on union-employer *agreement* follows from the doctrine's roots in the statutory labor exemption, which applies only "[s]o long as a union acts in its self-interest." *Hutcheson*, 312 U.S. at 232. Similarly, the nonstatutory labor exemption protects only "the unions' *successful* attempt to obtain [a] provision through bona fide, arm's-length bargaining *in pursuit of their own labor union policies*, and not at the behest of or in combination with nonlabor groups." *Jewel Tea*, 381 U.S. at 689-90 (opinion of White, J.) (emphasis added).[9]

Consistent with the limited exemption for certain categories of union-employer agreements described in *Connell*, *Jewel Tea* and *Pennington*, most courts of appeals have

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[9] *See Pennington*, 381 U.S. at 664 (because the NLRA "contemplates . . . agreements between the union and employers in a multi-employer bargaining unit," the nonstatutory exemption ensures "that a union may conclude a wage agreement" without violating the antitrust laws).

recognized that the nonstatutory labor exemption shields anticompetitive employer conduct only derivatively and only for agreements that have been successfully negotiated at arm's length with the employees' collective bargaining representatives.

The three-part test articulated in *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977), has come to be the operative test applied by the majority of courts that have addressed the issue. Under *Mackey*, a challenged restraint of trade will be immunized from antitrust scrutiny only where "the *agreement* sought to be exempted" (1) primarily affects only the parties to the collective bargaining relationship, (2) concerns a mandatory subject of collective bargaining, and (3) *"is the product of bona fide arm's-length bargaining." Id.* at 614 (emphasis added). Applying this test, the Eighth Circuit in *Mackey* held that the "Rozelle Rule"—a restraint on player mobility adopted by the NFL—was not entitled to immunity. The Rozelle Rule met the first two prongs of the court's test, but it failed the third because it had been "unilaterally promulgated by the clubs," and the Players Association had never engaged the NFL in bona fide arm's length bargaining over the rule, even though the rule *had* been incorporated by reference into the parties' collective bargaining agreement. *Id.* at 615-16.

The *Mackey* test, protecting only "agreement[s]" between employees and employers that are truly "the product of bona fide arm's-length bargaining," has been adopted and applied by the Sixth Circuit. *In re Detroit Auto Dealers Ass'n*, 955 F.2d 457, 463 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992); *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1197-98, 1203 (6th Cir. 1979). It has also been endorsed and relied upon by the Ninth Circuit, *see Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades Dist. Council*, 817 F.2d 1391, 1393-94 (9th Cir. 1987) (following "well-reasoned" *Mackey* test and exempting agreements that

"were the product of bona fide arms' length bargaining"), and the Fifth Circuit, *see Carpenters Local No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 530-31 (5th Cir. 1982) (nonstatutory labor exemption protects acts of employer "only incidentally" where there is an "agreement" between the employer and the union; "[t]he antitrust claims do not allege that any of these defendants have entered into agreements with any unions; thus, the nonstatuotry exemption should not come into play under these facts") (citing *Mackey*), *cert. denied*, 464 U.S. 932 (1983).

The Eighth Circuit's later opinion in *Powell v. NFL* falls squarely within the *Mackey* line of cases. Contrary to the majority's suggestion below, *see* App. 14a n.4, *Powell* neither second-guessed the *Mackey* rule nor threatened the vitality of *Mackey*'s "agreement" requirement. Indeed, the *Powell* court expressly reaffirmed the three-prong *Mackey* test: "[W]e feel that the analytic framework which [*Mackey*] adopts with respect to the nonstatutory labor exemption must be employed in this case." 930 F.2d at 1298. Moreover, the parties in *Powell* did not dispute that each of the three prongs of the test was satisfied with respect to the terms of their prior collective bargaining agreements while those agreements were in effect. *Id.* at 1298-99. The only issue in *Powell* was whether a challenged restraint that *had* been expressly agreed to by the Players Association and included in the expired collective bargaining agreements was still protected by the exemption following expiration of the agreements and after the NFL and the Players Association had bargained to impasse over a new contract. That issue was expressly reserved in *Mackey*. *See* 930 F.2d at 1298; *Mackey*, 543 F.2d at 616 n.18 ("we need not decide whether the effect of an agreement extends beyond its formal expiration date for purposes of the labor exemption").

Whether one believes *Powell* was correctly decided,[10] the Eighth Circuit's decision to extend the antitrust exemption beyond impasse for an expired collective bargaining agreement that concededly was "the product of bona fide, arm's-length bargaining," 930 F.2d at 1299, was still very much a decision premised on the necessary existence of a "union-employer agreement[]," *Connell*, 421 U.S. at 622. The *Powell* court was explicit in its belief that the union's prior consent to the challenged restraint "clothed" the restraint "with union approval" even after impasse. *See* 930 F.2d at 1302 (reasoning that exemption should continue to apply "where 'the union has had a sufficient impact in shaping the content of the employer's offers' *and where the challenged restraint is 'clothed with union approval'* ") (emphasis added) (quoting J. Weistart & C. Lowell, *The Law of Sports* § 5.06, at 590 (1979)). Thus, the United States, in its amicus brief in support of rehearing below, correctly observed that *Powell* is part of the "well-established body of precedent" from which the Court of Appeals in this case consciously departed. App. 121a n.3.

B. The D.C. Circuit's opinion here and the Second Circuit's opinion in *Williams* have created a clear split with the *Mackey* circuits. The majority below explicitly repudiated any notion that the nonstatutory labor exemption turns on union consent. *See* App. 19a (rejecting argument that "union *agreement* ought to be a precondition to any invocation of the nonstatutory labor exemption") (emphasis in original); *id.* at 14a n.4 (refusing to follow *Mackey*). *See also id.* at 121a (Brief for United States in Support of Rehearing) ("The majority's decision, unlike the established body of law, does not base the nonstatutory labor exemption on workers' collective-bargaining agreements."). Instead, with no moorings in employee consent, the Court of Appeals' conflict-creating

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[10] Petitioners believe *Powell* was wrong, for much the same reasons advanced by the United States in its 1990 amicus brief in that case urging the Court to grant certiorari.

test cloaks with antitrust immunity all concerted actions undertaken by a multi-employer cartel aimed at the labor market, regardless of any anticompetitive purpose or effects, provided only that there exists a collective bargaining "relationship." *See id.* at 10a, 29a. The Second Circuit adopted virtually the same rule in *Williams*. *See* 45 F.3d at 688-93 (concluding that by enacting labor laws sanctioning multi-employer bargaining, Congress intended that the antitrust laws would not apply to any joint activity by a multi-employer association that is related to the collective bargaining relationship).[11]

There can be no better indicator of the conflict among the circuits than the present case. At no point in the collective bargaining process did the Players Association ever agree to respondents' proposal to pay fixed salaries for developmental squad players. Upon impasse, the clubs' general labor law duty to bargain with the Players Association no longer precluded the unilateral imposition of new employment terms that were never previously agreed to by the union. Such unilateral imposition was not, and could not have been, an "agreement" that was "the product of bona fide arm's-length bargaining." *Mackey*, 543 F.2d at 614. It is plain that this case would have been decided differently under the *Mackey* rule.

The true nature of the conflict is well illustrated by *Mackey* itself. There is no doubt that under the *Brown/Williams* rule, the court in *Mackey* would have reached

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[11] In theory, *Williams* could have been decided on the same narrow grounds as *Powell*, since the issue before both courts was the same—whether antitrust immunity continues to apply to restraints contained in a bona fide bargaining agreement after the agreement has expired and the parties have bargained to impasse. The thrust of the Second Circuit's decision, however, is unmistakably broader. *See* App. 58a n.9 (Wald, J., dissenting) ("the *Williams* court announced a broad ouster of antitrust law, similar to the majority's here"). Indeed, the D.C. Circuit here relied extensively on *Williams*'s reasoning in concluding that "antitrust policy must give way" in a collective bargaining relationship. App. 28a; *see id.* at 25a-29a.

the opposite outcome. The restraint at issue there primarily affected the labor market and was proposed by the NFL as part of the collective bargaining process. Those facts alone would easily qualify the Rozelle Rule for immunity according to the D.C. and Second Circuits, and whether the restraint was "the product of bona fide arm's-length bargaining" would be irrelevant.

C. In its amicus brief supporting certiorari in *Powell*, the United States informed the Court that at that time there was no conflict among the courts of appeals on the issue presented. Nevertheless, because of the perverse incentives created by the Eighth Circuit's decision to extend the nonstatutory labor exemption beyond impasse, and the harm that the *Powell* decision would inevitably wreak on the policies and goals of both the labor and the antitrust laws, the United States urged the Court to take the case without waiting for a conflict to develop in the lower courts. *See* Brief for United States as Amicus Curiae in *Powell* 13-19.

As the United States recognized in its brief supporting rehearing in this case, the conflict that was absent in 1990 has now emerged. What is more, the rule adopted below and in *Williams* is considerably broader and more sweeping in its "potential for mischief," Brief for United States as Amicus Curiae in *Powell* 18, than even *Powell*'s application of the *Mackey* test. The case for certiorari is now compelling. In the words of Judge Tatel, resolution by this Court is "essential." App. 63a (Tatel, J., concurring in denial of rehearing *in banc*).

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT THAT REQUIRE A CARÈFUL HARMONIZATION BETWEEN THE ANTITRUST LAWS AND OTHER APPLICABLE LAWS AND WITH THIS COURT'S LABOR PREEMPTION DECISIONS.

In addition to finding "no support" in this Court's precedents concerning the nonstatutory labor exemption, App. 119a (Brief for United States in Support of Rehearing), the Court of Appeals' opinion conflicts irrecon-

cilably with two other important lines of authority from this Court. These separate conflicts constitute independent grounds for the exercise of certiorari jurisdiction under Sup. Ct. R. 10.1(c).

A. First, the majority's decision conflicts with those cases disfavoring implied repeals of the antitrust laws and requiring courts to reconcile the antitrust laws with competing statutory regimes by giving effect to both as far as possible. *See, e.g., National Gerimedical Hosp. v. Blue Cross*, 452 U.S. 378, 388-89 (1981) ("Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.") (internal quotation marks omitted); *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963) ("proper approach . . . is an analysis which reconciles the operation of both statutory schemes . . . rather than holding one completely ousted"); *United States v. Borden Co.*, 308 U.S. 188, 198-99 (1939) (repeal by implication disfavored and allowed only to the extent of a "positive repugnancy" between the two laws).

These principles control the scope and application of the nonstatutory labor exemption. *See Connell*, 421 U.S. at 622 (explaining that the nonstatutory exemption is designed to achieve "a proper accommodation" of labor and antitrust policies and applies only to the extent "labor policy requires"); *Pennington*, 381 U.S. at 665 (nonstatutory exemption concerned with "harmonizing" the Sherman Act with the NLRA policy of peaceful negotiation); *id.* at 666 (analysis asks whether national labor policy "conflicts with" application of the antitrust laws).

The Court of Appeals, however, "completely ousted" antitrust, *Silver*, 373 U.S. at 357, without any meaningful effort to reconcile what it perceived as competing policies. In truth, there is no "positive repugnancy" between the NLRA's regime of collective bargaining and the Sherman Act's safeguards of competition that could justify the broad new exemption announced by the majority. As the United States advised the Court in *Powell*:

> "Neither the text nor the history of the NLRA fairly suggests that Congress implicitly intended broadly to deprive unionized workers of the antitrust laws' protection from employer-imposed restraints on competition in the labor market. The text of the NLRA does not mention the antitrust laws, and the legislative history demonstrates no intent to restrict the preexisting rights of workers as the price of participation in a collective bargaining relationship—rights that presumably would continue to exist for other, non-unionized workers. To the contrary, the predominant thrust of the statute . . . is to expand the protection afforded employees." Brief for United States as Amicus Curiae in *Powell* 13-14.

The indictment offered by the United States in *Powell* applies with even greater force to the rule adopted by the D.C. and Second Circuits. Far from protecting labor policy, the complete ouster of antitrust rights under the *Brown/Williams* rule is utterly at war with that policy because it gives employees who choose collective bargaining distinctly fewer legal rights than employees who opt not to unionize. The fundamental labor law principle that all employees have a free and equal right to choose whether or not to have union representation for purposes of collective bargaining cannot co-exist with a rule that penalizes those who choose one option over the other.[12]

Furthermore, the NLRA's policy favoring collective bargaining is not impaired when antitrust review is applied to the unilateral implementation of employment terms by a multi-employer cartel. The employers' right to implement terms of employment post-impasse is simply

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[12] The harm to labor policy produced by the *Brown/Williams* rule is particularly evident on the facts of the present case. By choosing to be part of the bargaining unit represented by the Players Association, petitioners have, under the Court of Appeals' reasoning, permanently forfeited their antitrust rights as a practical matter. The option suggested by the Court of Appeals—union decertification, App. 30a—is illusory for petitioners, since the Players Association represents the entire roster of professional football players and cannot be expected to decertify solely to serve the interests of a narrow category of practice players like petitioners.

a continuation of their preexisting common law right to operate their businesses in pursuit of their own commercial interests. The concerted exercise of that right is ordinarily subject to review under the antitrust laws. *See, e.g., Anderson v. Shipowners' Ass'n*, 272 U.S. 359 (1926) (antitrust laws apply to industry-wide agreement setting uniform terms of employment). Once impasse is reached, fruitful negotiations have ceased and the employers may revert to their preexisting rights and unilaterally implement their proposals *without further bargaining*. There is thus no reason to carve out an exception from the ordinary application of antitrust in the context of impasse. Moreover, any possible interference with the labor scheme that might result from the potential threat of an antitrust action is minimized, if not eliminated altogether, by the ability of the various employers in the bargaining unit to act individually upon impasse, instead of as a cartel.

On the other hand, the majority's complete ouster of antitrust from the union-employer relationship thwarts the objectives of the Sherman Act, since it prevents employees (and even the Government) from taking action against anticompetitive restraints in the labor market. The greater the restraint of trade, the greater the interests of the Sherman Act and the more significant will be the harm caused by this new rule. The harm is particularly pronounced in the present case, because the district court below made a finding that respondents' salary-fixing efforts were in violation of § 1, and the jury found that petitioners had suffered financial injuries totalling more than $10 million. Those findings are not before the Court and must be presumed correct.

In sum, the Court of Appeals has made no attempt to "accommodat[e]" the policies of the antitrust laws, and the court's ouster of antitrust is in no way "require[d]" by a conflict with the NLRA. *Connell*, 421 U.S. at 622. Indeed, the extraordinarily expansive rule adopted by the Court of Appeals actually does considerable harm to the very labor policies that were invoked to justify it.

B. There is a second respect in which the Court of Appeals' opinion cannot be squared with decisions of this Court. As argued by Judge Wald in dissent, App. 54a-57a, the majority's reasoning conflicts utterly with the Court's analysis in cases involving implied preemption under the NLRA. *See, e.g., Livadas v. Bradshaw*, 114 S. Ct. 2068 (1994); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).

In the preemption context, the Court has staked out a clear distinction between the self-help *tactics* that parties are free to resort to as part of the collective bargaining process and the *terms* of employment that are the subject of the bargaining. The NLRA does not supersede state and federal laws that place substantive qualifications on terms of employment, such as minimum wage requirements. Such substantive qualifications are simply part of the preexisting legal "backdrop" against which the bargaining process occurs. *Fort Halifax*, 482 U.S. at 21. *See Metropolitan Life*, 471 U.S. at 757. Moreover, the Court has held that employees are entitled to rely on this legal backdrop in lieu of bargaining, and in the event of an impasse in negotiations, the preexisting backdrop controls. *See Livadas*, 114 S. Ct. at 2081-82 (labor law bargaining policy is not "served by forcing employees or employers to bargain for what they would otherwise be entitled to as a matter of course"); *Fort Halifax*, 482 U.S. at 20-22 ("backdrop" of preexisting law determines rights of employees and employers alike upon occurrence of bargaining impasse).

Significantly, in *Metropolitan Life*, this Court rejected an argument relied upon by the majority below: that a "law that interferes with the *end result* of bargaining" must be seen as "*even worse* than a law that interferes with the bargaining process." 471 U.S. at 752 (emphasis added). As explained by this Court, the labor laws are concerned with fostering "an equitable process" for bargaining, "not with particular substantive terms of the

bargain that is struck." *Id.* at 753. That core principle conflicts fundamentally with the Court of Appeals' analysis.[13]

Antitrust, like other forms of substantive regulation, such as occupational safety rules, minimum wage laws, and health insurance and employee benefit requirements, is properly seen as part of just such a "backdrop." The Court's decision in *Radovich v. NFL*, 352 U.S. 445 (1957), leaves no doubt that NFL-imposed restraints on players are subject to the antitrust laws and that antitrust rules are part of the backdrop for collective bargaining between the NFL and its players. *See id.* at 449-52. Although the rights created for the players by the Sherman Act can be *waived* through a collective bargaining agreement, that fact does not undercut the relevance of the labor preemption principles. Such a waiver is a voluntary relinquishment of a legal right and requires the consent of the employees through their labor representative. *See Livadas*, 114 S. Ct. at 2082 ("union-represented employees have the full protection of [preexisting] minimum standard[s], *absent any agreement* [*by the union*] *for something different*") (emphasis added). In *Fort Halifax*, moreover, this Court specifically held that a preexisting legal right is *not* preempted by the NLRA just because it is waivable through collective bargaining, and that, indeed, such waivability makes a legal right even more compatible with the NLRA. *See* 482 U.S. at 22.

As the United States argued on rehearing below, application of the antitrust laws to employers' concerted and unilateral imposition of wages "simply means that negotiations should ordinarily start from a competitive wage level rather than a level set by an employer cartel." App. 124a. That view is demanded by the labor pre-

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[13] *See Pennington*, 381 U.S. at 665 ("[T]here are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws.").

emption principles applied by this Court—principles that the Court of Appeals completely disregarded.

III. REVIEW BY THIS COURT IS APPROPRIATE BECAUSE THE COURT OF APPEALS' DECISION WILL HAVE PROFOUND AND LONG-TERM CONSEQUENCES FOR LABOR RELATIONS THROUGHOUT PROFESSIONAL SPORTS, THE ENTERTAINMENT INDUSTRY AND ALL OTHER INDUSTRIES THAT RELY ON MULTI-EMPLOYER BARGAINING.

In ousting antitrust entirely from the collective bargaining process, the Court of Appeals' decision will subvert the prospects for peaceful labor-management bargaining in major sectors of the national economy. These important consequences provide additional grounds for review by this Court.

As explained by the dissent below, the Court of Appeals' opinion gives multi-employer cartels a powerful new incentive to "hang tough on their demands" in collective bargaining and actually puts pressure on employees to abandon collective bargaining and forego unionization altogether. App. 47a (Wald, J., dissenting). These perverse incentives promise to undermine labor relations, not only in professional sports, but in the entertainment industry, the communications industry, and all other industries where employees individually negotiate terms of employment with multiple employers within the framework of a collective bargaining agreement.

In recommending certiorari in *Powell*, the United States warned of the consequences of extending the nonstatutory labor exemption beyond impasse:

> "Under the rule adopted by the court of appeals, the party burdened by the anticompetitive restraint (in this case, the players, as represented by their union) would apparently be relegated to three unsatisfactory options: (1) accede to the other side's terms (which are unlikely to represent a legitimate compromise because the other side is unlikely to pay for an antitrust exemption it can continue to enjoy

> for free); (2) call a strike (albeit with diminished chance of success because one of the levers available to achieve the initial contract—the credible threat of antitrust damages—is removed by perpetuation of the nonstatutory labor exemption after impasse); or (3) terminate the collective bargaining relationship and start from scratch. It is questionable whether that result is even appropriately compatible with the policies of the labor laws." Brief for United States as Amicus Curiae in *Powell* 15-16.

Experience in the sports industry in the five tumultuous years since *Powell* leaves no doubt that an unwarranted extension of the nonstatutory labor exemption, like that announced by the Court of Appeals here and by the Second Circuit in *Williams*, will inevitably "destabilize labor-management relations." Brief for United States as Amicus Curiae in *Powell* 18. Largely as a result of *Powell* (and more recently the *Williams* opinion), the business of professional sports over the past five years has been dogged by prolonged strikes and lockouts and by union decertifications. In direct response to *Powell*, professional football players decertified the Players Association and went without a bargaining agreement for six full seasons. *See* App. 30a, 48a.[14] In the National Hockey League, the players were locked out and no games were played for nearly half of last season.[15] Most recently, in

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[14] *See also supra* note 6. The NFL experience demonstrates the fallacy of the Court of Appeals' view that the collective bargaining process is strengthened by the elimination of antitrust. On November 6, 1989, as a direct result of the *Powell* decision, the Players Association formally abandoned its role as collective bargaining representative. Only after court approval of a comprehensive antitrust litigation settlement between the players and the team owners, including the payment of nearly $200 million in damages, *White v. NFL*, 822 F. Supp. 1389 and 836 F. Supp. 1458 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995), were the players able to reestablish their union and their bargaining relationship with the NFL.

[15] The Court of Appeals' reliance on recent experience in the NHL as proof that a collective bargaining agreement can be

the wake of *Williams*, labor-management relations in professional basketball have fallen into chaos. The owners have locked out the players, and hundreds of players have signed petitions to decertify their union. These results are particularly ironic for basketball, where antitrust had long proven to be a constructive complement to collective bargaining.[16]

Major league baseball, of course, has long been saddled with the "aberration" of a nonstatutory antitrust exemption. *Flood v. Kuhn*, 407 U.S. 258, 282 (1972). Baseball players' lack of antitrust rights has hardly been conducive to labor peace. It has produced the longest continuous streak of work stoppages and labor strife in any sport. Since the basic agreement was reached in baseball in 1970, there have been eight rounds of contract negotiations, *and each and every one has resulted in a strike or*

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reached without litigation, *see* App. 31a-32a, was misplaced. The NHL experience actually shows how collective bargaining can succeed when employers face a credible threat of antitrust action. The NHL owners publicly acknowledged that they refrained from unilaterally implementing their salary cap proposal after reaching an impasse with the players specifically because of the risk of antitrust liability. *See* Gordon, "NHLPA Eyes Suit; Owners May Hear Antitrust Charge," Boston Herald, Dec. 25, 1994, at B24. Ultimately, a new agreement was reached that did not include the owners' proposed salary cap.

[16] Professional basketball players had vigorously exercised their antitrust rights for well over two decades prior to *Powell* and *Williams*, and the players and the NBA owners had routinely incorporated the terms of court-approved antitrust settlements into new labor agreements. *See, e.g., Robertson v. NBA*, 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977). Until *Williams*, players and owners in the NBA concluded three successive collective bargaining agreements without a strike or lockout. Since *Williams*, they have been unable to reach an agreement, the players have moved to decertify their union, and the NBA owners have locked out the players—the first work stoppage in NBA history. *See* Helyar, "Pro Basketball Loses Its 'Feel Good' Image in Nasty Labor Dispute," Wall St. J., Aug. 7, 1995, at A1.

lockout.[17] The latest negotiations spanned two seasons and produced the longest work stoppage in the history of professional sports. By virtue of the blanket nonstatutory exemption from antitrust adopted in this case and in *Williams*, all other unionized professional sports, as well as all other industries with similar economic structures, are now effectively subject to the same, once "aberration[al]," judge-made immunity from competition that has clouded baseball.

For these very reasons, the Chairman of the National Labor Relations Board has observed that one "major result" of the Court of Appeals' decision here is that the critical "balance" between the federal labor and antitrust laws will be "eliminated altogether" and the fundamental objectives of labor policy will be thwarted:

> "[I]n football, basketball and presumably hockey, antitrust law and its treble damages remedy is relegated exclusively to the non-union sector, thereby creating an incentive for the players in the major professional sports to be non-union and for employers to foster unionized relationships regardless of their bona fide origin or status—a result which is hardly compatible with the promotion of freedom of association, collective bargaining and autonomous labor-management relationships—goals all enshrined in the National Labor Relations Act." William B. Gould IV, *Baseball and the "Sultan of Swat": "The Curse of the Bambino"*, Daily Lab. Rep. (BNA), Apr. 28, 1995, at E-1, E-2.

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[17] *See* Hearings on Major League Baseball's Antitrust Exemption Before the Subcomm. on Antitrust of the Senate Comm. on the Judiciary, 104th Cong., 1st Sess. (Feb. 15, 1995) (statement of Donald M. Fehr, Executive Director, Major League Baseball Players Association). On August 3, 1995, the Senate Judiciary Committee approved S. 627, a bill that would repeal baseball's antitrust exemption for labor matters. The bill's principal sponsor, Senator Hatch, stated that partial repeal of baseball's exemption was necessary because antitrust "immunity has distorted labor relations in major league baseball." Chass, "Baseball's Antitrust Exemption Suffers a Setback," N.Y. Times, Aug. 4, 1995, at B7, B9.

Similar harm is likely to follow in the entertainment field and other industries where collective bargaining and individual contract negotiations have traditionally occurred in combination. The United States in *Powell* stressed that in economic terms "[t]he potential for mischief is quite broad":

> "It includes the entertainment industry generally, which has an economic structure similar to professional sports. And it conceivably includes the more than 600 collective bargaining relationships involving multi-employer associations, which in turn cover more than three million employees." Brief for United States as Amicus Curiae in *Powell* 18-19 (citations and footnotes omitted).

The Court of Appeals' decision, if unreviewed by this Court, thus threatens to work substantial and widespread harm to labor relations and competition in many significant areas, which is an independent reason for the Court to exercise its certiorari jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 11, 1995

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 17, 1994 Decided March 21, 1995

Nos. 93-7165, *et al.*

ANTONY BROWN; JAMES BISHOP; JOHN BUDDENBERG;
GARY COUCH; CRAIG DAVIS; RICKY ANDREWS;
THOM KAUMEYER; WESLEY PRITCHETT;
AND JOHN SIMPSON,
INDIVIDUALLY AND ON BEHALF OF ALL CLASS MEMBERS,
Appellees

V.

PRO FOOTBALL, INC., D/B/A WASHINGTON REDSKINS;
THE FIVE SMITHS, INC., D/B/A ATLANTA FALCONS;
BUFFALO BILLS, INC., D/B/A BUFFALO BILLS;
CHICAGO BEARS FOOTBALL CLUB, INC.,
D/B/A CHICAGO BEARS;
CINCINNATI BENGALS, INC., D/B/A CINCINNATI BENGALS;
CLEVELAND BROWNS, INC., D/B/A CLEVELAND BROWNS;
DALLAS COWBOYS FOOTBALL CLUB, LTD.,
D/B/A DALLAS COWBOYS;
PDB SPORTS, LTD., D/B/A DENVER BRONCOS;
THE DETROIT LIONS, INC., D/B/A DETROIT LIONS;
GREEN BAY PACKERS, INC., D/B/A GREEN BAY PACKERS;
HOUSTON OILERS, INC., D/B/A HOUSTON OILERS;
INDIANAPOLIS COLTS, INC., D/B/A INDIANAPOLIS COLTS;
KANSAS CITY CHIEFS FOOTBALL CLUB, INC.,
D/B/A KANSAS CITY CHIEFS;
THE LOS ANGELES RAIDERS, LTD.,
D/B/A LOS ANGELES RAIDERS;
LOS ANGELES RAMS FOOTBALL COMPANY, INC.,
D/B/A LOS ANGELES RAMS;

MIAMI DOLPHINS, LTD., D/B/A MIAMI DOLPHINS;
MINNESOTA VIKINGS FOOTBALL CLUB, INC.,
D/B/A MINNESOTA VIKINGS;
KMS PATRIOTS, L.P., D/B/A NEW ENGLAND PATRIOTS;
THE NEW ORLEANS LOUISIANA SAINTS
LIMITED PARTNERSHIP, D/B/A NEW ORLEANS SAINTS;
NEW YORK FOOTBALL GIANTS, INC.,
D/B/A NEW YORK GIANTS;
NEW YORK JETS FOOTBALL CLUB, INC.,
D/B/A NEW YORK JETS;
THE PHILADELPHIA EAGLES FOOTBALL CLUB, INC.,
D/B/A PHILADELPHIA EAGLES;
B & B HOLDINGS, INC., D/B/A PHOENIX CARDINALS;
PITTSBURGH STEELERS SPORTS, INC.,
D/B/A PITTSBURGH STEELERS;
THE CHARGERS FOOTBALL COMPANY,
D/B/A SAN DIEGO CHARGERS;
THE SAN FRANCISCO FORTY-NINERS, LTD.,
D/B/A SAN FRANCISCO FORTY-NINERS;
THE SEATTLE PROFESSIONAL FOOTBALL CLUB,
D/B/A SEATTLE SEAHAWKS;
TAMPA BAY AREA NFL FOOTBALL, INC.,
D/B/A TAMPA BAY BUCCANEERS, INC.;
AND NATIONAL FOOTBALL LEAGUE,
Appellants

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and consolidated case No. 94-7071

On Appeal from the United States District Court
for the District of Columbia
(No. 90cv01071)

Before: EDWARDS, *Chief Judge*, WALD and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* EDWARDS.

Dissenting opinion filed by *Circuit Judge* WALD.

EDWARDS, *Chief Judge:* This case poses a conflict between the policies underlying federal labor law and antitrust law in the context of a labor dispute involving professional football. In the Sherman Act, 15 U.S.C. § 1 (Supp. II 1990), enacted in 1890, Congress proscribed certain practices and agreements inimical to free trade as a means "to promote the national interest in a competitive economy." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) (internal quotations omitted). There was no unified federal labor policy at the time of the passage of the Sherman Act. However, over fifty years later, when Congress passed the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* (1988), "it set down a federal labor policy . . . plainly meant to do more than simply alter the prevailing substantive law. It sought as well to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body [the National Labor Relations Board ("NLRB")] rather than the federalized judicial system." *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 288 (1971). A principal tenet of this federal labor policy is that settlement of collective bargaining disputes should be achieved by "subjecting labor-management controversies to the mediatory influence of negotiations," not litigation. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211 (1964). In this case, we must determine whether the nation's labor laws or antitrust policy control where, after bargaining in good faith to a point of impasse, an employer group takes unilateral action to impose a fixed salary for a category of employees as an otherwise lawful step in the collective bargaining process established by the NLRA.

In 1989, the 28 clubs of the National Football League ("NFL") were engaged in collective bargaining with the NFL Players Association ("NFLPA"), the players' collective bargaining representative. During the course of bargaining, the NFL proposed to pay a fixed salary of $1,000 per week to any player assigned to newly formed practice squads. Had the parties been able to reach a settlement on this issue, they could have concluded an agreement establishing $1,000 per week as the salary for practice squad players, and this agreement would have posed no legal problems under the federal labor or antitrust laws. Such was not to be the case, however, for the parties bargained to impasse over the issue, after which the clubs unilaterally imposed the fixed salary for the 1989 NFL season. In response to the clubs' action, nine players who had been assigned to practice squads filed this class action antitrust lawsuit against the clubs and the NFL in the District Court, alleging that the fixed salary constituted an unreasonable restraint of trade in violation of the Sherman Act. During four years of ensuing litigation, the District Court held that the defendants' agreement on a fixed salary violated the Sherman Act, and, after a trial to determine damages, entered a judgment against the clubs and the NFL in the amount of $30,349,642, and enjoined them from ever again setting a uniform salary for any class of players.

While the clubs and the NFL raise a number of challenges to the District Court's actions, we need not address most of them, for we hold that the District Court erred in rejecting the appellants' claim that the *nonstatutory labor exemption* shields them from liability in this case. This exemption, a judicially-created doctrine designed to reconcile federal labor and antitrust policies, has had an important place in federal jurisprudence for almost 30 years. Although there has been much debate over the years regarding the scope of the exemption, there is at least one principle that seems clear: restraints on competition law-

fully imposed through the collective bargaining process are exempted from antitrust liability so long as such restraints primarily affect only the labor market organized around the collective bargaining relationship. Thus, employees confronted with actions imposed lawfully through the collective bargaining process must respond not with a lawsuit brought under the Sherman Act, but rather with the weapons provided by the federal labor laws.

The NFL was free to take unilateral action after impasse (just as the NFLPA was free to strike), because the action was a legitimate economic weapon available to be used in an attempt to force a settlement. This is exactly what federal labor policy condones, as the Supreme Court has often recognized:

> [A] particular activity might be 'protected' by federal law not only [where it falls] within § 7 [of the NLRA], but also when it [is] an activity that Congress intended to be 'unrestricted by *any* governmental power to regulate' because it [is] among the permissible 'economic weapons in reserve . . . actual exercise [of which] on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.'

Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 141 (1976) (quoting *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 488, 489 (1960)). And, as the Second Circuit has recently held:

> [T]he antitrust laws do not prohibit employers from bargaining jointly with a union, from implementing their joint proposals in the absence of a [collective bargaining agreement], or from using economic force to obtain agreement to those proposals. What limits on such conduct that exist are found in the labor laws.

National Basketball Ass'n v. Williams, 45 F.3d 684, 693 (2d Cir. 1995). We agree.

Because the NFL in this case acted lawfully within the framework of the collective bargaining process when it unilaterally imposed a fixed salary for practice-squad players, and because this action affected only the market for professional football player services, the nonstatutory labor exemption precludes any finding of liability under the Sherman Act. Accordingly, we reverse the decision of the District Court.

I. Background

This case arises from a labor dispute over salaries for a limited number of professional football players whose jobs required them to practice with regular NFL players, and to replace regular players who became injured, but not otherwise to play in NFL football contests. In 1987, a collective bargaining agreement governing the terms and conditions of employment for all professional football players expired, and the NFL and NFLPA began negotiations for a new agreement. In early 1989, with the two sides making little progress toward such an agreement, the owners adopted an amendment to the NFL Constitution that altered the rules governing players on the clubs' injured-reserve lists and established new Developmental Squads of practice and replacement players. The amendment, known as Resolution G-2, allowed each club to maintain a Developmental Squad of as many as six rookie or "first-year" [1] practice and replacement players in addition to its usual 47-player roster. Resolution G-2 departed from the customary NFL practice of setting player salaries through individual negotiation. It anticipated a fixed salary for the Developmental Squad players, though it did not establish the amount of that salary.

The NFL and NFLPA engaged in fruitless negotiations over Resolution G-2. On April 7, NFL Management

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[1] A first-year player is a player who, in a previous year, attended an NFL training camp but played in fewer than three regular season games.

Committee ("NFLMC") Executive Director Jack Donlan solicited a meeting with NFLPA Executive Director Gene Upshaw to negotiate the terms and conditions of employment for Developmental Squad players. On May 17, 1989, a league management committee proposed that the salary for Developmental Squad players be set at $1,000 per week. On May 18, Donlan again sought a meeting with Upshaw. Subsequently, on May 30, 1989, Upshaw responded with a letter stating that the NFLPA agreed only "that players can be listed on a developmental squad of an NFL club if they have all of the benefits and protections which players on the Active List have," including "the right to negotiate their own salaries." Letter from Gene Upshaw to Jack Donlan (May 30, 1989), *reprinted in* Joint Appendix ("J.A.") 54. Donlan and Upshaw met on June 16, 1989, to discuss the Developmental Squad portion of Resolution G-2. In a letter to Donlan memorializing the discussions at that meeting, Upshaw rejected the fixed salary component of the Developmental Squad proposal, holding to the position that "all players, including developmental, should have the right to negotiate salary terms, and that no fixed wage for any group of players is acceptable to the NFLPA." Letter from Gene Upshaw to Jack Donlan (July 6, 1989), *reprinted in* J.A. 58. As a result, Donlan concluded that the issue was "clearly at impasse" for "implementation purposes." Letter from Jack Donlan to Hugh Culverhouse *et al.* (June 16, 1989), *reprinted in* J.A. 55.

The NFL then unilaterally implemented the Developmental Squad program by distributing uniform contracts for Developmental Squad players to all teams. Club officials were advised that paying any such player more or less than $1,000 per week would result in disciplinary action, including loss of future draft choices. *See* Memorandum from Pete Rozelle, NFL Commissioner, to NFL General Managers, Player Personnel Directors (Aug. 24, 1989) at 1, *reprinted in* J.A. 2538. Resolution G-2 al-

lowed the clubs to form their Developmental Squads from players remaining available after each club reduced its regular roster to 47 players on September 4. Under the resolution, the clubs could sign Developmental Squad players to contracts after 4 p.m. on September 5, 1989. During the 1989 season, 236 players signed Developmental Squad contracts.

On May 9, 1990, appellee Antony Brown and eight other Developmental Squad players[2] ("the Players") brought a class action lawsuit against all 28 NFL clubs and the NFL itself on behalf of 235 of the 1989 Developmental Squad players, alleging that the defendants engaged in price-fixing in violation of the Sherman Act by setting a $1,000 fixed salary for such players. On June 4, 1991, the District Court granted the Players' motion for partial summary judgment, and denied the NFL's cross-motion, on the issue of whether the Players' suit was precluded by the nonstatutory labor exemption to the antitrust laws. *Brown v. Pro Football, Inc.*, 782 F. Supp. 125 (D.D.C. 1991). The District Court relied on three alternative rationales to support its judgment. First, it held that the exemption ended when the parties' collective bargaining agreement expired in 1987. *Id.* at 130-34. Second, the court held that, even if the exemption survived the expiration of the collective bargaining agreement, it ended when the parties reached impasse regarding the issue of Developmental Squad player salaries. *Id.* at 134-37. Finally, the District Court held that, in any event, the exemption was inapplicable because it protects only restraints on competition contained in collective bargaining agreements, and the fixed salary had not previously been encompassed in any agreement between the NFL and NFLPA. *Id.* at 137-39.

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[2] The other players representing the plaintiff class were James Bishop, John Buddenberg, Gary Couch, Craig Davis, Ricky Andrews, Thom Kaumeyer, Wesley Pritchett, and John Simpson.

On March 10, 1992, the District Court granted the Players' motion for summary judgment on the issue of antitrust liability. *Brown v. Pro Football, Inc.*, 1992-1 Trade Cas. (CCH) ¶ 69,747 (D.D.C. 1992), *reprinted in* J.A. 422. With liability established, the District Court on September 21, 1992, began a ten-day jury trial on the issues of antitrust injury and damages. The jury awarded damages to the players in the class that, when trebled in accordance with section 4 of the Clayton Act, 15 U.S.C. § 15 (1988), totaled $30,349,642. *Brown v. Pro Football, Inc.*, Civ. Action No. 90-1071 (D.D.C. Oct. 5, 1992) (judgment on the verdict), *reprinted in* J.A. 2714. In the wake of this verdict, the District Court denied the clubs' motion for judgment as a matter of law, or a new trial, and granted the Players' request for a permanent injunction barring the clubs from ever again setting a uniform regular season salary for any category of players. *Brown v. Pro Football, Inc.*, 1993-1 Trade Cas. ¶ 70,260 (D.D.C. 1993), *reprinted in* J.A. 2911. Finally, on March 1, 1994, the District Court awarded the Players' counsel $1,744,578.41 in attorney's fees. *Brown v. Pro Football, Inc.*, 846 F. Supp. 108 (D.D.C. 1994).[3]

II. Analysis

On appeal, the clubs and the NFL challenge each of the District Court's decisions. However, we address only the District Court's rejection of appellants' nonstatutory labor exemption defense, because we deem it dispositive. We review *de novo* the District Court's entry of summary judgment on this issue. *SEC v. Bilzerian*, 29 F.3d 689, 695 (D.C. Cir. 1994).

Appellants contend that the nonstatutory labor exemption applies to all restraints on competition imposed through the collective bargaining process, even those imposed unilaterally by an employer. In their view, any

[3] Meanwhile, the NFLMC and the NFLPA finally agreed to a new seven-year collective bargaining agreement on January 6, 1993.

other rule would disrupt the balance of power between unions and employers that exists under federal labor law. The Players, meanwhile, argue that the exemption applies only where a union has consented to a restraint on competition. They contend that the exemption must be narrowly constructed to apply only where unions act in tandem with employers, as, for example, by entering into collective bargaining agreements.

After reviewing relevant Supreme Court precedent and the policies underlying both the NLRA and the Sherman Act, we conclude that the nonstatutory labor exemption shields from antitrust challenge alleged restraints on competition imposed through the collective bargaining process, so long as the challenged actions are lawful under the labor laws and primarily affect only a labor market organized around a collective bargaining relationship. Because the fixed salary for Developmental Squad players is such an action, we hold that the exemption shields the clubs and the NFL from liability in this case.

A. Origin of the Exemption

An exemption to the antitrust laws for activities related to collective bargaining traces its origin to sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 (1988), 29 U.S.C. § 52 (1988), and to the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* (1988). Clayton Act section 6 excludes human labor from the definition of a commodity and provides that the antitrust laws do not prohibit labor organizations. Section 20 of that Act along with the Norris-LaGuardia Act, limits the authority of federal courts to enjoin specified union activities. While none of these statutory provisions is phrased in terms of an exemption from the Sherman Act, the Supreme Court has interpreted them generally to waive antitrust liability for unilateral union conduct such as boycotts and picketing. *See H.A. Artists & Assoc., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 714-15 (1981); *United States v. Hutcheson*, 312

U.S. 219, 232 (1941). This exemption, known as the statutory labor exemption, does not exempt bilateral activity, such as "concerted action or agreements between unions and nonlabor parties." *Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 622 (1975). However, the Supreme Court has recognized

> that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions.

Id. Unlike the statutory exemption, this nonstatutory exemption is available to both unions and employers. *See Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 847 n.14 (3d Cir. 1974); *see also, e.g., Powell v. NFL*, 930 F.2d 1293, 1303 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

Although the Supreme Court has recognized a nonstatutory labor exemption to the antitrust laws, the scope of the exemption never has been conclusively delimited. Instead, the Court's cases in this area mark out only the general boundaries of the doctrine. The Court's first major decision addressing a restraint on competition imposed through the collective bargaining process came in *Allen Bradley Co. v. Local No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 799-800 (1945), in which a local union of electrical workers in New York City reached an agreement with local manufacturers and contractors requiring the contractors to buy equipment only from manufacturers employing union members, and the manufacturers to sell only to contractors employing union members. This arrangement severely curtailed competition from firms outside the city, inflating prices for electrical equipment in the local market. *Id.* at 800. When excluded manufacturers challenged the agreement under the Sherman Act, the union claimed an exemption from

antitrust liability. The Supreme Court rejected this claim, concluding that "Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services." *Id.* at 808.

The Court reached a similar conclusion two decades later in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), in which it addressed an antitrust challenge to a contract between a union and large coal mining companies by which the union agreed to impose a new, higher wage upon smaller coal companies as part of a concerted effort to drive the smaller firms from the industry. A majority of the Court rejected the union's claim to an exemption from the Sherman Act. *Id.* at 661. While Justice White's opinion for the Court acknowledged that "a union may conclude a wage agreement with [a] multi-employer bargaining unit without violating the antitrust laws and . . . may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers," it held that "a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units." *Id.* at 664-65.

Pennington's promise of a nonstatutory labor exemption to the Sherman Act was realized in a companion case, *Local No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., Inc.*, 381 U.S. 676 (1965). There, the Court, in opinions by Justices White and Goldberg, applied the exemption to shield from antitrust liability a multi-union, multi-employer agreement to close food store meat departments at 6 p.m. so as to prevent butchers from being replaced by self-service markets or unskilled workers during night hours. Justice White, writing for three justices, balanced the interest of union workers against the impact on the product market, finding the restriction on working hours to be of "immediate and

direct" concern to union members and noting that the subject matter of the agreement—employees' working hours—was "well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain" under the NLRA. *Id.* at 691. Justice Goldberg, writing for three other justices, went further, concluding that all "collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to antitrust laws." *Id.* at 710.

Finally, in its most recent opinion on the subject, the Court in *Connell Construction*, 421 U.S. at 616, held the nonstatutory exemption inapplicable where a plumbers union forced a general contractor to sign an agreement requiring the contractor to subcontract construction work only to firms maintaining collective bargaining agreements with the union. The Court found that this arrangement "indiscriminately excluded nonunion subcontractors from a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods." *Id.* at 623. The Court stated:

> This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws.

Id. at 625.

In assessing the relevance of these cases to the issue before us, we note initially that the Court never has considered whether the exemption applies where, as here, an antitrust claim arises from a dispute over a negotiable condition of employment between parties to the collective

bargaining process. Nevertheless, the Players contend that the Supreme Court's precedents dictate a rule to govern this case. They seek to extract from the Court's opinions a rule that the exemption applies only where a union has manifested its consent to a restraint on trade by signing a collective bargaining agreement. They emphasize that both the *Connell Construction* and *Jewel Tea* opinions refer to the nonstatutory exemption as a shield from antitrust liability for union-employer "agreements."[4] *Jewel Tea Co.*, 381 U.S. at 689 (White, J.); *Connell Constr. Co.*, 421 U.S. at 622. Absent union consent, the Players contend, the exemption is inapplicable. We disagree. Indeed, we believe that the Players' view is based on a distorted reading of the case law.

The language in the opinions upon which the Players rely must be read in context. As the previous discussion indicates, each of the pertinent Supreme Court cases involved an antitrust challenge to a union-employer agreement. In such circumstances, the Court's reference to the nonstatutory labor exemption in terms of a potential

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[4] Appellees also rely heavily on the Eighth Circuit's discussion of the nonstatutory labor exemption in *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977), which, they contend, "repeatedly expressed the understanding that the Supreme Court decisions precondition the exemption on an agreement." Brief of Appellees at 29. However, they overlook the Eighth Circuit's subsequent statement in *Powell*, 930 F.2d at 1301, that "[a] collective bargaining agreement is not always essential to a finding that challenged employment terms fall within the labor exemption." We also note, as did the *Powell* court, *id.*, that other decisions of the courts of appeals have applied the nonstatutory exemption to actions not embodied in collective bargaining agreements. *See, e.g., Amalgamated Meat Cutters v. Wetterau Foods, Inc.*, 597 F.2d 133, 136 (8th Cir. 1979) (holding that employer's agreement with supplier to replace striking workers was protected by nonstatutory labor exemption); *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers*, 431 F.2d 1004, 1006-07 (5th Cir. 1970) (holding that employer's refusal to deal with union was exempt from Sherman Act), *cert. dismissed*, 404 U.S. 801 (1971).

shield from antitrust liability for such agreements is hardly surprising.[5] Certainly, no Supreme Court case expressly limits the exemption in the manner suggested by the appellees. Thus, nothing in any of the Court's opinions, from *Allen Bradley* to *Connell Construction*, disposes of the issue before us.

While not dispositive, however, the Court's opinions do provide significant guidance for our reconciliation of the competing antitrust and labor policies in this case. First, in its most extensive discussion of the nonstatutory labor exemption, the Court characterized the doctrine as representing a "proper accommodation between the congressional policy favoring *collective bargaining* under the NLRA and the congressional policy favoring free competition in business markets." *Connell Constr. Co.*, 421 U.S. at 622 (emphasis added). Thus, the Court recognized that the juxtaposition of policies giving rise to the exemption focuses on collective bargaining as a *process*, not merely on the *product* of that process—the collective bargaining agreement.

We also observe that, in applying the nonstatutory labor exemption, the Court consistently has struggled to balance the interests of those involved in collective bargaining against the impact of their activities on the *product market*, paying litttle attention to any impact on the *labor market*. *See, e.g., Pennington*, 381 U.S. at 663 (stating that union and mining companies who agreed on price at which companies would sell their coal could be unshielded by exemption because "the restraint on the product market

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[5] In this regard, we note that even one commentator who favors imposing a union consent requirement for application of the nonstatutory labor exemption acknowledges that a "precedent-oriented" approach to this issue is "problematic . . . because in no Supreme Court case has union consent been contested." Note, *Releasing Superstars From Peonage: Union Consent and the Nonstatutory Labor Exemption*, 104 HARV. L. REV. 874, 881-82 (1991) [hereinafter *Releasing Superstars*].

is direct and immediate"); *Jewel Tea*, 381 U.S. at 690 n.5 (stating that "crucial determinant" for application of exemption to an agreement is the agreement's "relative impact on the product market and the interests of union members"); *see also Wood v. National Basketball Ass'n*, 809 F.2d 954, 963 (2d Cir. 1987) ("Each of the [Supreme Court's] decisions [applying the nonstatutory labor exemption] involved injuries to employers who asserted that they were being excluded from competition in the product market." (emphasis omitted)). Nothing in the Court's opinions supports appellees' attempt to import antitrust principles into a labor market organized around a collective bargaining relationship. "Quite the contrary, the issue has been whether even to go so far as to impose antitrust sanctions for the kind of product market activities involved in *Pennington*." Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 27 (1971). In short, we agree with those commentators who have observed that

> [f]rom *Allen-Bradley* to *Pennington*, the majority of the Court has insisted that one factor be present before the Sherman Act applies to arrangements arrived at through collective bargaining: one group of employers must conspire to use the union to hurt their competitors. The line the Court has consistently sought to draw, therefore, is the line between the product market and the labor market.

Id. at 26.

Thus, from the Court's opinions we derive two principles to guide our application of the nonstatutory labor exemption. First, the exemption must be broad enough in scope to shield the entire collective bargaining process established by federal law. Second, the case for applying the exemption is strongest where a restraint on competition operates primarily in the labor market and has no anticompetitive effect on the product market. We believe

these principles find support not only in the Supreme Court's precedents, but also in the policies underlying both the NLRA and the Sherman Act.

B. The NLRA

The NLRA makes clear that federal labor policy focuses on collective bargaining as a process, rather than collective bargaining agreements alone. In the NLRA, Congress established "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). This obligation "is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole." *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 678 (1981). Thus, two factors define the collective bargaining process under federal law: the "necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms." *Insurance Agents' Int'l Union*, 361 U.S. at 489.

As the foregoing suggests, collective bargaining under the NLRA is a carefully defined *bilateral* process. Unions and employers alike enjoy protections under the collective bargaining process. Unions are not the sole beneficiaries of the NLRA. For example, unions may strike, *see NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962); *see also* 29 U.S.C. § 163, but employers may lock out their workers, *see American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 310-11 (1965). Further, unions are protected against unilateral action by employers with respect to subjects of mandatory bargaining while negotiations over such subjects are ongoing, *see NLRB v. Katz*, 369 U.S. 736, 743 (1962), and continue to enjoy this protection until negotiations end in impasse, *see Southwestern Steel &*

Supply, Inc. v. NLRB, 806 F.2d 1111, 1113 D.C. Cir. 1986). At that point, however, "an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals." *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1165 (D.C. Cir. 1992) (Edwards, J., concurring in denial of petition for enforcement) (emphasis omitted) (quoting *American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622, 624 (D.C. Cir. 1968)). Employers may not fire workers engaged in economic strikes, and must rehire such workers at the conclusion of such a strike absent "legitimate and substantial business justifications" for doing otherwise. *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378 (1967) (quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967)). Under an exception to this rule, however, employers may hire permanent replacements for strikers. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938). Finally, while the NLRA requires both employers and unions to bargain collectively, it does not require either side to agree. *See* 29 U.S.C. § 158(d) (providing that duty to bargain "does not compel either party to agree to a proposal or require the making of a concession"). Rather, the statute generally leaves the outcome of negotiations to the parties, with government intervention largely proscribed. *See Insurance Agents' Int'l Union*, 361 U.S. at 488 ("Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences."); *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) (stating that NLRB's role under the Act is "to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties").

Thus, a careful reading of the federal labor laws militates strongly against the Players' argument that the nonstatutory labor exemption shields restraints on competition

only when unions have consented to them by signing collective bargaining agreements, for that argument necessarily incorporates the premise that federal labor policy somehow favors unions in the collective bargaining process. As the terms of the NLRA amply demonstrate, federal policy favors neither party to the collective bargaining process, but instead stocks the arsenals of both unions and employers with economic weapons of roughly equal power and leaves each side to its own devices.

Some commentators have suggested that union *agreement* ought to be a precondition to any invocation of the nonstatutory labor exemption, because, in their view, the federal labor laws are primarily designed to foster *employee rights* to engage in collective bargaining. At one level, this argument is a nonsequitur, for the right to engage in collective bargaining does not encompass the right of agreement. At another level, the argument expresses more an aspiration than a reality. It is true that the NLRA strongly protects the right to join and form unions, but at least since Congress passed the Labor Management Relations Act of 1947, 29 U.S.C. § 141 *et seq.* (1988) ("LMRA"), federal labor law has expressed a "policy of voluntary unionism." *Pattern Makers' League v. NLRB*, 473 U.S. 95, 105 (1985). The LMRA expressly gave employees the right to refrain from collective bargaining activity, *see* 29 U.S.C. § 157, and, while it maintained the obligation of employees to pay union dues under union security agreements, it established that an employer would commit an unfair labor practice by discharging an employee "for failing to abide by union rules or policies with which he disagrees." *Pattern Makers' League*, 473 U.S. at 106; *see* 29 U.S.C. § 158(a)(3). Thus, under the NLRA, employees have an equal right to join or refrain from joining unions and engaging in collective bargaining.

Accordingly, to accommodate federal labor policy, we must preserve the delicate balance of countervailing power

that characterizes the process. Injecting the Sherman Act into the collective bargaining process would disrupt this balance by giving unions a powerful new weapon, one not contemplated by the federal labor laws. With such a weapon at their disposal, union workers could do what the plaintiff class has done here: invoke the antitrust laws and their threat of treble damages to gain an advantage in bargaining over a salary provision about which union members do not care deeply enough to strike. In sum, a proper respect for the national labor policy expressed in the NLRA and the LMRA requires us to recognize the nonstatutory labor exemption as a potential shield for all lawful actions taken by either unions or employers pursuant to the collective bargaining process. Indeed, only the most crude accommodation of the federal labor and antitrust policies would shield union-employer agreements from Sherman Act liability, but leave exposed the lawful means employed in the process to reach those agreements.

In this regard, we find it telling that those judges and commentators who favor leaving certain aspects of the collective bargaining process unshielded by the exemption cannot agree on any point at which the exemption must expire in order to properly accommodate federal labor policy. *See, e.g., Powell v. NFL,* 678 F. Supp. 777, 788 (D. Minn. 1988) ("[P]roper accommodation of labor and antitrust interests requires that a labor exemption relating to a mandatory bargaining subject survive expiration of the collective bargaining agreement until the parties reach impasse *as to that issue.*"), *rev'd,* 930 F.2d at 1293; *Bridgeman v. National Basketball Ass'n,* 675 F. Supp. 960, 967 (D.N.J. 1987) (holding that nonstatutory labor exemption for restraint on competition contained in expired collective bargaining agreement survives impasse in negotiations over new agreement "only as long as the employer continues to impose that restriction unchanged, and reasonably believes that the practice or a close variant of it will be incorporated in the next collecitve bargaining agreement"); Kieran M. Corcoran, *When Does*

The Buzzer Sound?: The Nonstatutory Labor Exemption In Professional Sports, 94 COLUM. L. REV. 1045, 1072 (1994) (suggesting that "the exemption should extend until it becomes clearly unreasonable for both of the parties to believe the particular provision will continue to exist in that form in a succeeding agreement"); Ethan Lock, *The Scope Of The Labor Exemption In Professional Sports*, 1989 DUKE L.J. 339, 400 (1989) ("[T]he proper accommodation of federal antitrust and labor law requires that the labor exemption expire simultaneously with the collective bargaining agreement."). The one common thread in this dizzying array of options is that not one of the proposals makes the slightest sense under established labor law principles.[6]

We also find it telling that the more recent decisions construing the nonstatutory labor exemption establish a clear trend in favor of shielding the collective bargaining process in its entirety. Most notably, in *Powell v. NFL*, 930 F.2d at 1293, the Eighth Circuit applied the nonstatutory labor exemption to bar an antitrust attack on free agency restrictions contained in an expired collective bargaining agreement even after negotiations on a new agreement ended in impasse. The *Powell* court concluded, as we do here, that

> [t]he labor arena is one with well established rules which are intended to foster negotiated settlements rather than intervention by the courts. The League and the Players have accepted this "level playing field" as the basis for their often tempestuous relationship, and we believe that there is substantial jus-

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[6] We also note that each of these alternatives has its own set of problems. In particular, those that require a court to determine when it is reasonable to believe a restraint on competition will be incorporated into a future collective bargaining agreement pose severe problems of administrability. Further, they are likely to prompt the negotiating parties to distort their positions through posturing designed solely to influence this determination.

> tification for requiring the parties to continue to fight on it, so that bargaining and the exertion of economic force may be used to bring about legitimate compromise.

Id. at 1303; *see also, e.g., Williams*, 45 F.3d at 688 (holding that antitrust laws do not prohibit employers from bargaining jointly with a union and implementing their joint proposals in the absence of a collective bargaining agreement); *Wood*, 809 F.2d at 959 ("[N]o one seriously contends that the antitrust laws may be used to subvert fundamental principles of our federal labor policy as set out in the [NLRA].").

Finally, we observe that the Players have offered no coherent theoretical framework in support of their view that the exemption expires with the collective bargaining agreement. Under their view, a multi-employer bargaining unit could be held liable under the antitrust laws for adhering to the terms of an alleged restraint on competition embodied in an expired collective bargaining agreement prior to impasse, despite the fact that employers face an unfair labor practice charge if they alter the terms of agreement during that period.[7] *See Southwestern Steel & Supply, Inc.*, 806 F.2d at 1113. At the same time, however, the Players submit that such employers could not similarly be held liable for locking out employees to gain an advantage in negotiations. *See* Tr. of Oral Argu-

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[7] The employers' duty to maintain the status quo even after expiration of a collective bargaining agreement fosters the bargaining process by protecting the union's position as the representative of the employees on subjects of mandatory bargaining, and by maintaining a stable environment for negotiations. *See Katz*, 369 U.S. at 747; *Insurance Agents' Int'l Union*, 361 U.S. at 485. We cannot fathom how subjecting actions taken pursuant to this duty to the threat of antitrust liability could possibly further the goals of the NLRA. Employers faced with such a threat might well hesitate to agree with unions on important terms when they know the union may immediately challenge the terms under the antitrust laws once their agreement expires.

ment at 42. We find this reasoning incomprehensible. Both an employer's adherence to expired terms prior to impasse and its decision to lock out employees are unilateral but lawful aspects of the collective bargaining process established by the NLRA—as, for that matter, is an employer's unilateral implementation after impasse of a term encompassed within its pre-impasse proposals.

In an effort to find a theoretical framework to support the Players' position, the dissent relies heavily on a purported distinction between the unilateral implementation of employment terms after impasse and other bargaining "tactics" utilized by both employers and employees in the collective bargaining process. Not only is such a distinction completely without support in the case law, but, as even the dissent itself acknowledges, such a view is patently contrary to Supreme Court precedent. On this point, the Court in *American Ship Building Co.*, 380 U.S. at 316, made it clear that an employer's right to "institute unilaterally the working conditions which he desires" is among the lawful "tools of economic self-help" available to be utilized as a tactic in collective bargaining. It is beyond the authority of this court to find otherwise.

C. The Sherman Act

As the policy underlying the NLRA supports the principle that the nonstatutory labor exemption shields the entire collective bargaining process, so too the policy underlying the Sherman Act supports the principle that the case for applying the exemption is strongest where a restraint on competition operates primarily in the labor market. The Sherman Act states simply that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. While the statutory language speaks broadly of *every* restraint of trade, the Supreme Court has long since limited its application to only those

restraints deemed unreasonable. *See Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911) (stating that "the criteria to be resorted to in any given [Sherman Act] case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason"). In an effort to give content to this reasonableness standard, courts have conceived of the Sherman Act as a "consumer welfare prescription." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (internal quotations omitted). Thus, the Sherman Act's primary focus is the product market, not the labor market. As one preeminent commentator has stated, "the antitrust laws are not concerned with competition among laborers or with bargains over the price or supply of labor—its compensation or hours of service or the selection and tenure of employees." Archibald Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252, 255 (1955). Indeed, in considering the standing of labor unions to bring antitrust claims, the Supreme Court has stated that "a union, in its capacity as bargaining representative, will frequently not be part of the class the Sherman Act was designed to protect, *especially in disputes with employers with whom it bargains.*" *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 540 (1983) (emphasis added).

We recognize, of course, that, as a general matter, the antitrust laws may apply to restraints on competition in non-unionized labor markets. *See, e.g., Radovich v. NFL*, 352 U.S. 445, 449-52 (1957). However, we think the inception of a collective bargaining relationship between employees and employers irrevocably alters the governing legal regime. Once employees organize a union, federal labor law necessarily limits the rights of individual employees to enter into negotiations with their employer. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *see also* 29 U.S.C. § 159(a) (providing that representatives selected to bargain for employees in a collective bargaining unit "shall be the exclusive repre-

sentatives of all the employees in such unit for the purposes of collective bargaining"). Indeed, employers are positively prohibited from seeking to bargain with individual employees, absent consent from the union. *See J.I. Case Co. v. NLRB*, 321 U.S. 332, 338-39 (1944). Moreover, employers may lawfully reduce competition in the labor market by forming multi-employer bargaining units, allowing for standardization of wage rates and working conditions within an industry. *See generally NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 94-96 (1957). Thus, once collective bargaining begins, the Sherman Act paradigm of a perfectly competitive market necessarily is replaced by the NLRA paradigm of organized negotiation—a paradigm that itself contemplates collusive activity on the parts of both employees and employers. Stubborn adherence to antitrust principles in such a market can only result in "a wholesale subversion" of federal labor policy. *Wood*, 809 F.2d at 959.

When this case is put in proper perspective, it is very difficult to take seriously the Players' claim that the action of the NFL violated the Sherman Act. If the Players had been negotiating with a single football team (instead of the multi-employer group), there is no doubt whatsoever that that single employer lawfully could have taken unilateral action to impose a fixed salary for practice team players after bargaining in good faith to a point of impasse. Indeed, the players do not assert otherwise, for they recognize that this is standard fare in labor law. And nothing in the antitrust law is intended to proscribe such unilateral action by a single employer. So the heart of the Players' position appears to be that the presence of a multi-employer bargaining unit should make a difference under the antitrust law. This is a wholly untenable position, we think, for the reasons given in a compelling decision recently issued by the Second Circuit:

> The existence of employer organizations that bargained with unions of employees pre-dated the pas-

sage of the Sherman Act in 1890. . . . Indeed, at that time these organizations existed at the national as well as local level. . . . Nevertheless, we find during the 104 succeeding years not a single instance, prior to this very case, of a union or an individual employee asserting the stark claim that the routine practices of multiemployer bargaining violate the antitrust laws. It is true that recent antitrust challenges in the professional sports industry have at times involved facts very similar to those in the instant matter, *see Powell*, 930 F.2d at 1293; *Brown v. Pro Football, Inc.*, 782 F. Supp. 125 (D.D.C. 1991); *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960 (D.N.J. 1987), but the multiemployer bargaining issue appears to have been raised obliquely, if at all.

To the extent Congress has focused on the legality of multiemployer collective bargaining, it has always indicated its approval, or at least an assumption of legality. In 1920, Congress sought in the Clayton Act to prevent federal courts from interfering in labor disputes. Although Congress was largely concerned with the effect of such interference on unions, the statute was phrased in an evenhanded fashion to protect employer conduct in labor disputes as well as that of unions. Section 20 thus exempted from federal prohibition "persons . . . terminating any relation of employment . . . or withholding . . . moneys or things of value," language that would permit multiemployer lockouts. 29 U.S.C. § 52. In 1932, Congress passed the Norris-LaGuardia Act, which barred federal courts from issuing injunctions against firms seeking to join, or remain members of, employer organizations, 29 U.S.C. § 104(b), and used language similar to that of the Clayton Act quoted *supra*, 29 U.S.C. § 104(c). The definition of persons involved in a labor dispute also recognizes the existence of employer organizations. *See*

29 U.S.C. § 113(b). *See also California State Council of Carpenters v. Associated Gen. Contractors,* 107 L.R.R.M. 2724, 2725 (9th Cir. 1981) ("[E]ven if the antitrust laws had been interpreted so as to bring multiemployer bargaining units within the scope of the Sherman Act, the statutory exemption found in section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, when read together with section 20 of the Clayton Act, 29 U.S.C. § 52, clearly exempts '[b]ecoming or remaining a member . . . of any employer organization' from the antitrust laws. 29 U.S.C. § 104(b)." (footnote omitted)). In 1947, Congress refused to limit multiemployer bargaining because it concluded that such bargaining "was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." [*NLRB v. Truck Drivers Local Union No. 449 ("Buffalo Linen"),* 353 U.S. 87, 95 (1957)] (discussing congressional debate over the Taft-Hartley amendments of 1947).

The lack of any antitrust challenge to, or congressional action restricting, multiemployer bargaining, for a century during which it prominently existed, grew, and flourished, strongly suggests some kind of general understanding about the legality of multiemployer bargaining that is fundamentally inconsistent with [the Players'] claim.

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We believe that the history recounted here strongly suggests that Congress never intended that the antitrust laws prohibit multiemployer bargaining with a common union. Congress seemed to assume, and then to act on that assumption in 1947, *see Buffalo Linen,* 353 U.S. at 95-96, that multiemployer bargaining was both efficient and a necessary counterweight to union power. Such a belief arguably fits within Rule of Reason analysis that permits "an-

> cillary restraints" necessary to a legitimate transaction. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899). Whether as a court we would reach that result if writing on a clean slate is not the issue, however, because whatever doubt might have existed as to Congress' intent was entirely eliminated by the passage of federal labor laws.
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> [M]ultiemployer bargaining has been a conspicuous feature of collective bargaining since the very formation of unions. To hold at this late date that it—or the essence of practice under it—is illegal under the antitrust laws would cause a massive reshaping of the institution of collective bargaining. . . . The only basis for the claim asserted by [the Players] is that multiemployer bargaining is illegal.
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> *Buffalo Linen* simply cannot be reconciled with [the Players'] antitrust claim. The facts in that case plainly involved conduct that, if antitrust principles apply, were price-fixing and a joint boycott, *per se* violations of the Sherman Act. However, the decision not only permitted the conduct but also stated that Congress had expressly considered multiemployer bargaining and had resolved to allow it subject only to the limitations of labor law as interpreted by the Labor Board.

Williams, 45 F.3d at 692.

We therefore conclude that when federal labor policy collides with federal antitrust policy in a labor market organized around a collective bargaining relationship, antitrust policy must give way. No one disputes that this conclusion is correct where a restraint on trade is embodied within a valid collective bargaining agreement. However, we see no need for a different rule in cases

in which a multi-employer bargaining unit lawfully implements a term rejected by the union after bargaining breaks down. In such a case, "the gist of the antitrust theory is little more than that hard bargaining by employers with unions violates the Sherman Act." Jacobs & Winter, *supra*, at 27.

D. Application of the Exemption

Based on our review of relevant Supreme Court precedent and the policies underlying both the NLRA and the Sherman Act, we conclude that injecting antitrust liability into the system for resolving disputes between unions and employers would both subvert national labor policy and exaggerate federal antitrust concerns. Accordingly, we hold that the nonstatutory labor exemption waives antitrust liability for restraints on competition imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining. Our conclusion dictates that the exemption bars the plaintiff class in this case from challenging the fixed salary for Developmental Squad players under the antitrust laws. The clubs and the NFL imposed the fixed salary only after negotiations over the issue reached impasse, and the fixed salary was encompassed within their pre-impasse proposals. Thus, their action was a lawful part of the collective bargaining process established by the NLRA. Further, the fixed salary operates as a restraint on competition in the labor market, specifically, the market for Developmental Squad player services, which is organized around the collective bargaining relationship between the NFL and the NFLPA. Indeed, counsel for the plaintiff class at oral argument acknowledged that the fixed salary for Developmental Squad players had no effect on the product market.[8]

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[8] Counsel acknowledged that the restraint on competition at issue in this case had no impact on the quality of professional football

In our view, the nonstatutory labor exemption requires employees involved in a labor dispute to choose whether to invoke the protections of the NLRA or the Sherman Act. If employees wish to seek the protections of the Sherman Act, they may forego unionization or even decertify their unions. We note that the NFL players took exactly this latter step after the Eighth Circuit's *Powell* decision. *See Releasing Superstars, supra,* at 883 (describing NFLPA decertification after *Powell*). Decertification also occurs when newly organized unions are unable to negotiate their first contract. We do not mean to encourage this practice, but we believe that employees, like all other economic actors, must make choices. If they choose to avail themselves of the advantages of the collective bargaining process, their protections are as defined by the federal labor laws. The system established by those statutes offers employees many benefits: recognition of organized workers as a bargaining unit, thereby

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competition, and, thus, professional football's ability to compete with other entertainment products. Specifically, counsel stated:

> [W]hat we are talking about here are the salaries that were paid to players who didn't even suit up, much less play. For them to say that somehow or other the competitive contest[s] were improved and they could compete better with ballet is like a bootstrap leap into wonderland. There is just no relationship.

Tr. of Oral Argument at 33.

As the quoted statement suggests, the clubs and the NFL contend that the fixed salary does impact the market for professional football contests, but they argue that it has the entirely procompetitive effect of improving the overall quality of NFL competition. Specifically, they assert that the fixed salary provides a disincentive for the most talented rookie and first-year players to agree to being "stashed" on the Developmental Squads of top NFL teams, and thereby makes such players available to less successful teams that need their services immediately. *See* Brief of Appellants at 8-9, 39-40. Significantly, neither party ever has argued that the fixed salary for Developmental Squad players has any *anticompetitive* impact on the market for the NFL's product—the only market involved in this case with which the Sherman Act is concerned.

giving them bargaining strength; establishment of mandatory subjects of bargaining; protection of the right to strike; allowance for the possibility of negotiated grievance procedures and pooled benefit plans; and judicial enforcement of collective bargaining agreements. Further, it establishes a significant list of employer actions that, if taken, constitute unfair labor practices for which employees and unions may seek redress before the NLRB. However, under the system established by the federal labor laws, employees win concessions not by filing antitrust lawsuits, but with shrewd bargaining, favorable grievance settlements, victories in arbitration, and, when necessary, by striking.

We recognize that the history of bargaining between the NFL and the NFLPA, which includes a failed strike by the players during the 1987 season, has prompted some commentators to conclude that "[t]he union cannot effectively strike." Ed Garvey, *Foreword To The Scope Of The Labor Exemption In Professional Sports: A Perspective On Collective Bargaining In The NFL*, 1989 DUKE L.J. 328, 337 (1989); *see also* Lock, *supra*, at 354-59 (discussing factors creating "an inherently unequal bargaining relationship between players and owners" in professional football). While we express no opinion on the NFLPA's ability to win the concessions it desires through organized activity, we reject the notion that an inequality of bargaining power in *any* industry justifies judicial intervention under the auspices of the Sherman Act. Federal labor law guarantees a process, not any particular result. Thus, it does not "contain a charter for the National Labor Relations Board"—or, we believe, for the courts—"to act at large in equalizing disparities of bargaining power between employer and union." *Insurance Agents' Int'l Union*, 361 U.S. at 490.

In this regard, we think the recently resolved labor dispute in the National Hockey League illustrates that collective bargaining, instead of litigation, can operate as an effective means of union-employer dispute resolution

in professional sports. On January 11, 1995, after a 103-day lockout, professional hockey's players and owners agreed upon a new collective bargaining agreement. Neither side received everything it wanted. Club owners yielded on the issue of a player salary cap. Players were required to accept limits on free agency. *See generally* Len Hochberg, *Last-Minute Deal Saves NHL Season*, WASH. POST, Jan. 12, 1995, at A1. Such is the nature of the collective bargaining process. Most importantly, however, the league now is operating pursuant to terms endorsed by both sides—not terms dictated by a federal court. While this model for dispute resolution may not be perfect, Congress has selected it to govern labor relations in this country, and it certainly is more balanced than the system that would prevail in professional football if its players were free to wield the threat of Sherman Act liability as a negotiating tool.

III. CONCLUSION

In sum, the clubs and the NFL are exempt from Sherman Act liability in this case. Our holding does not mean that, freed of the threat of treble damages, employers will henceforth seek to force every set of negotiations with employees to impasse so that they may unilaterally implement the employment terms they desire. Employers always face the threat of a strike for such actions. Perhaps more importantly, they face the pressures toward settlement that inhere in an ongoing employer-employee relationship in which each side needs the other to accomplish its goals.

> Initially it may be only fear of the economic consequences of disagreement that turns the parties to facts, reason, a sense of responsibility, a responsiveness to government and public opinion, and moral principle; but in time these forces generate their own compulsions, and negotiating a contract approaches the ideal of informed persuasion.

Archibald Cox, *The Duty To Bargain In Good Faith*, 71 HARV. L. REV. 1401, 1409 (1958).

Nor does our holding mean that the antitrust laws are completely without force where labor agreements are at issue. Employers and unions certainly face liability when they conspire to use a collective bargaining agreement as an economic weapon against their competitors in the product market. *See, e.g., Pennington*, 381 U.S. at 665-66; *Allen Bradley*, 325 U.S. at 808. However, where, as here, an alleged restraint on competition imposed through the collective bargaining process affects only the bargaining parties, and has no impact on the product market, the nonstatutory labor exemption shields those parties from antitrust liability. Accordingly, the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

So ordered.

WALD, *Circuit Judge*, dissenting: Today the majority holds that the so-called "nonstatutory labor exemption" totally immunizes employers from antitrust liability when they unilaterally impose industry-wide terms of employment, in restraint of competition in the labor market, so long as the employers have previously engaged in unsuccessful collective bargaining with their employees over those issues. In so holding, the majority decides that employees who exercise their statutory rights to bargain collectively automatically forfeit antitrust rights to which they otherwise would be entitled. Thus, employees must now choose between foregoing collective bargaining altogether, thereby retaining antitrust protection against employer restraints on the labor market; or engaging in collective bargaining at the risk of forfeiting all antitrust remedies if bargaining fails and the employers unilaterally foist unagreed-to industry-wide terms upon them.

The majority insists its ruling does no more than maintain a level playing field in employer-employee relations and carry out the congressional mandate favoring collective bargaining as the primary means of resolving labor disputes. I do not think so. The reality is that today's decision sharply tilts the playing field in employers' favor, and because of that, will erode the vitality of collective bargaining itself. The rule announced today gives multiemployer groups both renewed incentives and unprecedented power to impose industry-wide terms of employment regardless of union consent and without fear of antitrust liability. Multiemployer groups will enjoy new freedom to harden bargaining positions, secure that if the employees do not submit at the bargaining table, the employers may impose their negotiating proposals after bargaining has irretrievably stalled. Employees in a weak bargaining position will likely opt in favor of clinging to antitrust protection as the less risky course of action; these employees will henceforth have powerful incentives *not* to engage in collective bargaining at all, since any collective bargaining opens the door to employer imposi-

tion of labor market restraints if bargaining fails. It could in extreme cases drive employees to decertify their unions, as the only guarantee against threats by multiemployer groups to unilaterally impose industry-wide wage caps and unacceptable working conditions.

All this suggests less, not more, collective bargaining and fewer, not more, successfully negotiated collective bargaining agreements. The majority decision thus poses a threat to the central purpose of our labor laws of promoting collective bargaining as the primary vehicle for ensuring labor peace. This result neither harmonizes labor law with antitrust law, nor comports with the congressional design of our statutory labor law regime.

I. Applicability of Antitrust Laws to Restraints on the Labor Market

Absent special statutory or judge-made exemption, a multiemployer agreement unilaterally imposing uniform industry-wide terms of employment, and thereby restraining competition in the labor market, runs afoul of the antitrust laws.[1] Concededly, employer-imposed restraints on the labor market are most prominent in professional sports. Employers in other fields generally favor open competition in the labor market, believing that, in the absence of chronic labor shortages, competition for jobs will

[1] The majority characterizes the players' position as an illbegotten effort to "import" and "inject" antitrust principles into collective bargaining. Majority opinion ("Maj. op.") at 15, 18. This of course turns the question inside-out. Historically and logically, antitrust comes first; the antitrust statutes antedate our labor laws and are of general applicability, applying to labor markets unless some statutory or judge-made exemption creates an exception. The question before us then, is whether we should now *extend* a judicially-created exemption from antitrust coverage for collective bargaining agreements into the previously uncharted territory of post-collective bargaining imposition of the employers' terms. Thus we might better ask to what extent we must "import" and "inject" labor law practices beyond the collective bargaining context into antitrust laws that would otherwise apply.

generally hold down wages and produce higher quality and better motivated workers. Historically, restraints on competition in the labor market have originated in employees' attempts to counter this downward pressure on wages through collective bargaining agreements fixing uniform wages and terms of employment. In professional sports, however, the situation is reversed. Because top-level athletic talent is scarce, competition tends to drive salaries up, at least for the top performers. Thus professional athletes have sought to maximize competition among employers for their unique athletic skills.[2] Predictably, the owners have reacted with multiemployer efforts to restrain competition for professional athletes' services.[3] *See, e.g., Flood v. Kuhn*, 407 U.S. 258 (1972)

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[2] Ironically, athletes have sought to achieve employer competition through the same collective bargaining processes that other employees use to *restrain* labor market competition. Players' unions typically bargain for such mobility-enhancing and competition-maximizing measures as "free agency" and the elimination of reserve clauses, salary caps and player drafts. Simultaneously, however, players' unions have embraced more traditional union demands such as league-wide minimum salaries and standardized pension plans. *See* Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 341 n.12.

[3] I express no opinion as to whether these labor market restraints actually violate the antitrust laws. In most cases, a rule of reason analysis will decide, *see Smith v. Pro Football Inc.*, 593 F.2d 1173, 1182-83 (D.C. Cir. 1978), requiring a fact-specific judgment as to whether the procompetitive benefits, if any, of the labor market restraint outweigh its anticompetitive costs. In the present case, appellants colorably argued below that the wage restraint imposed on rookie and first-year nonroster players was necessary to enhance on-field "competitive balance" among teams, thereby making NFL football a more attractive and economically competitive entertainment product. *Cf. NCAA v. Board of Regents*, 468 U.S. 85 (1984). The district court may have erred in ruling such alleged procompetitive benefits "irrelevant" and granting summary judgment to the players on the question of antitrust liability. Although the majority does not reach the question, I would be inclined to remand for further proceedings on the question of antitrust liability under rule of reason analysis.

(baseball "reserve clause"); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976) (football "Rozelle rule" limiting player mobility); *Smith v. Pro-Football, Inc.*, 420 F. Supp. 738 (D.D.C. 1976) (football player draft), *aff'd in part & rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978); *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979) (hockey reserve system); *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960 (D.N.J. 1987) (basketball draft, salary cap, and right of first refusal).

Nonetheless, it is important to remember that multiemployer labor market restraints are not entirely confined to professional sports, so that today's majority rule has implications beyond the football gridiron. In *Anderson v. Shipowners' Ass'n*, 272 U.S. 359 (1926), the Supreme Court held that an industry-wide agreement setting uniform terms and conditions of employment for seamen was subject to antitrust scrutiny. Lower courts have similarly recognized that the antitrust laws presumptively apply to employer-imposed restraints on labor markets. *See, e.g., Ostrofe v. H.S. Crocker Co., Inc.*, 740 F.2d 739, 742-43 (9th Cir. 1984) (multiemployer agreement not to hire "whistleblowers"); *Hennessey v. NCAA*, 564 F.2d 1136, 1147-51 (5th Cir. 1977) (multicollege agreement to limit employment of athletic coaches); *Newberger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057, 1082 (2d Cir.) (employee noncompetition clauses), *cert. denied*, 434 U.S. 1035 (1977); *Quinonez v. National Ass'n of Sec. Dealers, Inc.*, 540 F.2d 824, 827-28 (5th Cir. 1976) (multiemployer blacklisting agreement); *Nichols v. Spencer International Press*, 371 F.2d 332, 334 (7th Cir. 1967) (multiemployer "non-switching" agreement restricting mobility of employees); *Cordova v. Bache & Co.*, 321 F. Supp. 600 (S.D.N.Y. 1970) (multiemployer action to reduce compensation paid to securities brokers), *later opinion sub nom. Jacobi v. Bache & Co.*, 377 F. Supp. 86 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 1231 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976). *See also*

Gardella v. Chandler, 172 F.2d 402, 408 (2d Cir. 1949) (L. Hand, J.) ("[W]hatever other conduct the [antitrust] Acts may forbid, they certainly forbid all restraints of trade which were unlawful at common-law, and one of the oldest and best established of these is a contract which unreasonably forbids anyone to practice his calling.").

Admittedly, a few commentators have suggested that antitrust laws should not apply to restraints on labor markets. *See, e.g.*, Archibald Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252, 254-55 (1954); Milton Handler, *Labor and Antitrust: A Bit of History*, 40 ANTITRUST L.J. 233, 235 (1971); Theodore J. St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 606 (1976). They argue that, despite the broad language of the antitrust statutes prohibiting *every* restraint on trade, the central purpose of the antitrust laws is not to promote competition *per se*, but to protect consumers from anticompetitive practices. *See generally* ROBERT BORK, THE ANTITRUST PARADOX (1978). Thus if an anticompetitive restraint affects only input markets, *e.g.*, labor, and not output markets, *e.g.*, products, it should not be subject to antitrust scrutiny. *See, e.g.*, Elinor R. Hoffmann, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 BROOKLYN L. REV. 1 (1983) (tracing distinction between input and output markets to legislative history of Sherman Act).

It is, however, not possible to square this minority view with the development of our antitrust jurisprudence. *See* II PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶¶ 338b & 338c (1978) (employer agreements restricting the labor market are subject to antitrust liability); James M. Altman, *Antitrust: A New Tool for Organized Labor?*, 131 U. PA. L. REV. 127 (1982) (reviewing cases and common law antecedents, concluding that employer restraints on labor markets are subject to antitrust laws). The Supreme Court has clearly held that

antitrust laws apply not only to restraints on *output* markets, but to *input* markets as well, including both labor, *Anderson, supra; Radovich v. National Football League,* 352 U.S. 445 (1957), and input commodities, *e.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, 236 (1948) (sugar refiners' agreement to fix input prices paid for sugar beets violates Sherman Act, which "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers" but instead "is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated"). *See also United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 223 (1940) (Sherman Act prohibits any "combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity" and agreements to make "purchases [of inputs] at or under the market are one species of [unlawful] price-fixing"); *American Tobacco Co. v. United States,* 328 U.S. 781 (1946) (applying antitrust law to restraints on input market for tobacco as well as output market for tobacco products); *Swift & Co. v. United States,* 196 U.S. 375 (1905) (same, for livestock inputs and meat outputs). *Cf. National Macaroni Mfr's Ass'n v. Federal Trade Comm'n,* 345 F.2d 421, 426 (7th Cir. 1965) (purpose and effect of agreement to fix composition of macaroni product was to depress input price of semolina, thereby violating Sherman Act).

Economists too have long recognized that market inefficiencies created by anticompetitive restraints on input markets can be as destructive of a free market economy (and therefore ultimately damaging to consumers) as restraints on output markets. *See, e.g.,* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY 36-43 (1993); *see also Mandeville Farms,* 334 U.S. at 241-44 (describing how restraints on input market adversely affect output market). While antitrust prosecutions for restraints on in-

put markets are relatively rare, this is explained by the fact that restraints on input markets arise only in the unusual circumstance of an effective monopsony—a single purchaser, or a group of purchasers acting in concert. And monopsony in turn arises only when the resource is uniquely valuable *in its current use,* so that even if the price is depressed by monopsony, sellers are unable to find alternative buyers. RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST 150 (1981) (monopsony can arise when "resources hav[e] substantially greater value in some uses than in others" so the "sole purchaser . . . will . . . be able to force the [seller] . . . to accept a monopsony price"); BLAIR & HARRISON, *supra,* at 43-44 (inelasticity of supply facilitates collusive monopsony). Thus, for example, in the *Mandeville Island Farms* case, the sugar refiners' monopolistic price-fixing scheme was effective because growers could not easily find other buyers or profitably switch to other crops when refiners conspired to fix the price of sugar beets. *See* 334 U.S. at 240-42. Nonetheless, according to the economists, there is a deadweight loss associated with imposition of monopsony pricing restraints. Some producers will either produce less or cease production altogether, resulting in less-than-optimal output of the product or service, and over the long run higher consumer prices, reduced product quality, or substitution of less efficient alternative products. *See, e.g.,* HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW § 1.2, at 17-18 (1985)); BLAIR & HARRISON, *supra,* at 42-43, 72. So, even proceeding from the premise that antitrust laws aim only at protecting consumers, monopsonies fall under antitrust purview because monopsonistic practices will eventually adversely affect consumers.

Athletic prowess is, of course, a unique and highly specialized resource, of precisely the genre vulnerable to monopsony manipulation. With a few notable exceptions, athletes typically excel in a single sport, and their labor

has greater market value in that sport than in any other profession. If team owners join together to suppress the price of athletic services through monopsony practices, most athletes will not be able to switch profitably to other lines of work. Thus, the labor market for professional athletes' services is one of a very few areas where there is real potential for anticompetitive monopsonistic practices. BLAIR & HARRISON, *supra*, at 72. Economic theory tell us, however, that monopsony will diminish output over time. Because *some* talented athletes *will* switch to other sports or other professions, or decided not to enter the field, the overall quality of athletic performance in the sport will then decline, to the detriment of consumers. Thus, both legal precedent and economic theory instruct that—absent some special exemption—antitrust principles do and should apply to such monopsonistic practices. As the majority acknowledges, Maj. op. at 23, professional athletes presumptively have antitrust protection against monopsonistic restraints on the market for their services,[4] *as long as they forego collective bargaining with their employers.*

In sum, antitrust law has a significant role to play as an antidote to anticompetitive restraints on labor markets. That role should be ousted only as necessary to implement clear congressional directives.

II. THE STATUTORY AND NONSTATUTORY EXEMPTIONS

Our next inquiry is whether any special exemption—statutory or judge-made—applies to immunize labor market restraints from expected antitrust scrutiny. In resolving this question, we are informed by the familiar nostrum that "exemptions from the antitrust laws are to be narrowly construed," *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979). This princi-

[4] Baseball is an exception for historical reasons. *See Flood v. Kuhn*, 407 U.S. 258 (1972).

ple applies equally to express and implied exemptions. *Id.* Implied exemptions to the "fundamental national policies embodied in the antitrust laws," *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973), in particular, should be found "only if necessary to make the [conflicting statutory scheme] work, and even then only to the minimum extent necessary," *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

The so-called statutory labor exemption is clearly inapplicable here. The "statutory exemption" is embraced in two enactments: sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52, enacted in 1914, exempting unions from coverage of the Sherman Act and prohibiting the issuance of injunctions against specified labor activities; and sections 1 through 15 of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115, enacted in 1932, barring federal courts from enjoining certain other specified union activities. "These statutes declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws." *Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 621-22 (1975). The statutory labor exemption thus shields unions and specified union activities. *H.A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 713-15 (1981). Section 4(b) of the Norris-LaGuardia Act, however, does bar injunctions against "any person or persons participating in or interested in [a labor] dispute . . . [b]ecoming or remaining a member of . . . any *employer* organization. . . ." 29 U.S.C. § 104(b) (emphasis added). Thus, the statutory exemption appears to immunize membership in a multiemployer bargaining unit. *See California State Council of Carpenters v. Associated Gen'l Contractors*, 648 F.2d 527, 544-45 (9th Cir. 1980), *rev'd on other grounds*, 459 U.S. 519 (1983). But beyond bare membership, the Clayton and Norris-LaGuardia Acts do not identify any

protected class of multiemployer *conduct*. This is in marked contrast to their detailed specifications of protected union and employee conduct. *Id.* at 534-36. The multiemployer conduct at issue in this case therefore falls beyond the narrow scope of any statutory labor exemption.

The only other possible source of exemption from the antitrust statutes is the nonstatutory labor exemption, a judicially-created doctrine that attempts to harmonize the potentially inconsistent requirements of labor law and antitrust law. "The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions." *Connell*, 421 U.S. at 622. Because the exercise of labor law rights and duties—generally encouraging *collective* action—may be inconsistent with prohibitions on concerted action of any kind under the antitrust laws, courts have carved out an implied exemption to antitrust coverage. Courts presume that Congress implicitly intended to exempt from antitrust scrutiny those concerted activities explicitly authorized by labor laws that are essential to collective bargaining. The prime example is the ordinary collective bargaining agreement. Although no statutory exemption shields such agreements from antitrust scrutiny, the collective bargaining scheme established by the national labor laws would be mortally undercut if collective bargaining agreements were subject to collateral attack under the antitrust laws as "combinations in restraint of trade." *See Local No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., Inc.*, 381 U.S. 676, 689 (1965) (Opinion of White, J.) ("Employers and unions are required to bargain about wages, hours, and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects."); *id.* at 711-12 (Opinion of Goldberg, J.) ("To tell the parties that they must bargain about a point but may be subject to antitrust penalties if they reach an agreement is to stultify the congressional scheme.").

The few cases in which the Supreme Court has addressed the nonstatutory labor exemption involved employer-employee agreements which also had discernible anticompetitive effects on product output markets. *See United Mine Workers v. Pennington,* 381 U.S. 657 (1965) (exemption does not apply to agreement to impose uniform industry-wide terms on employers not party to the agreement); *Jewel Tea,* 381 U.S. at 676 (exemption applies to agreement limiting marketing hours despite ancillary anticompetive effect on product market, where restraint is tailored to protect direct interests of bargaining unit members); *Connell,* 421 U.S. at 635 (exemption does not apply to agreement barring subcontracting to nonunion subcontractors). As the majority accurately notes, several of these cases held the nonstatutory exemption inapplicable when its primary purpose or effect was to restrain product output markets. Maj. op. at 14-15. But nothing in these cases supports the majority's reverse contention that antitrust law is totally unconcerned with labor markets once collective bargaining has been undertaken but failed to resolve the dispute. In truth, Supreme Court precedent is wholly inconclusive as to whether the nonstatutory labor exemption embraces anything like the unilateral employer-imposed labor market restraints at issue here. At best, the relevant Supreme Court cases establish only that there *is* a nonstatutory labor exemption, and that its umbrella protects at least some employer-employee *agreements,* while others, *i.e.,* those whose primary purpose or effect is to restrain product output markets, are not immune.

Two sister circuits have recently adopted expanded interpretations of the nonstatutory labor exemption to cover post-impasse situations similar to the one here. *See National Basketball Association v. Williams,* 45 F.3d 684 (2d Cir. 1995); *Wood v. National Basketball Ass'n,* 809 F.2d 954 (2d Cir. 1987); *Powell v. National Football League,* 930 F.2d 1293 (8th Cir. 1989), *cert. denied,* 498 U.S. 1040 (1991). But other courts have refused to

extend it beyond employer-employee agreements. *See e.g., McCourt*, 600 F.2d at 1197-98; *Bridgeman*, 675 F. Supp. at 964-65; *Smith*, 420 F. Supp. at 741-42.

Precedent is of limited assistance, then, in deciding whether to extend the nonstatutory exemption doctrine to the situation at hand. Striking the appropriate balance requires us to go further and examine the underlying policies and principles of both labor law and antitrust law, effecting "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets," *Connell*, 421 U.S. at 622.

The majority presses a deceptively simple solution: whenever antitrust coverage potentially overlaps with activities authorized by labor law, and only the labor market is affected by the challenged restraint, antitrust law must give way. The majority's is a bright-line rule, no mistake. Additionally, it keeps federal courts out of messy labor-management disputes. There is much to be said for the twin virtues of economy and elegance, but they may be purchased at too high a price—in this case the substantial interests of players and fans in guarding against uncontrolled labor market restraints. Over the long haul, the majority's approach will not serve the interests of labor law by promoting collective bargaining. And it certainly will not comport with our judicial duty to carve out only the narrowest antitrust exemption compatible with the effective implementation of the labor laws.

III. Maintaining the Employer-Employee Balance

The majority insists its rule granting employers an antitrust exemption for terms unilaterally imposed after a bargaining impasse is required so that employers can engage in hard bargaining as permitted by the labor laws, and thereby "preserve the delicate balance of countervail-

ing power," Maj. op. at 18, that is necessary to keep unions from gaining the upper hand. The majority rightly points out that the labor laws contemplate a system of countervailing economic pressure between employers and employees, under which both sides have incentives to bargain. *See* Julius G. Getman, *The Protection of Economic Pressure by Section 7 of the NLRA*, 115 U. PA. L. REV. 1195, 1196 (1967). But we must also be mindful that "a primary purpose of the National Labor Relations Act was to redress the perceived *imbalance of* economic power between labor and management . . . by conferring certain affirmative rights on employees and by placing certain enumerated restrictions on the activities of employers." *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965) (emphasis added). Once Congress established this scheme, it contemplated that neither the courts nor the National Labor Relations Board would intervene on a case-by-case basis to adjust the parties' relative bargaining power, but rather leave them to fight it out at the bargaining table. *American Ship Bldg.*, 380 U.S. at 317-18; *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477, 497-500 (1960). Of course, Congress itself from time to time adjusts the balance, as it did in enacting the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1957, further limiting union conduct. *Insurance Agents*, 361 U.S. at 500.

In my view, the majority's rule does much more than "preserve the delicate balance" in labor-management relations already established by labor law. It decisively tips the balance by giving employers important *new* rights, together with new incentives to harden their bargaining positions. Because employers can now unilaterally impose labor market restraints that heretofore might have exposed them to antitrust liability,[5] the majority's rule provides

[5] The applicability of antitrust law to unilaterally-imposed terms of employment was not a settled question prior to today's decision. But since antitrust coverage *presumptively* applies to labor markets

new incentives to raise the stakes in bargaining in hope of winning industry-wide labor market restraints that might never before have been attempted. It also encourages employer groups to hang tough on their demands, since at impasse they may be able to impose any bargaining proposals the employees have rejected without fear of antitrust liability. The majority's rule does not just *protect* hard bargaining; it positively *encourages* it. It makes impasse more likely and successful collective bargaining *less* likely.[6]

On the employees' side, the majority's rule also creates new incentives, none of them helpful to the bargaining process. First, some employees—especially those in a weak bargaining position—are under pressure *not* to enter into collective bargaining at all, lest the existence of a

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absent a special exemption, and no exemption clearly applied before today, it is fair to say that until now employers at least had to contemplate the *risk* of antitrust liability if they unilaterally imposed industry-wide terms of employment.

[6] A related concern is that some employers may be emboldened to go beyond *hard* bargaining and engage in "surface bargaining," merely "going through the motions of negotiating," *K-Mart Corp. v. NLRB*, 626 F.2d 704, 706 (9th Cir. 1980), in order to position themselves to unilaterally impose industry-wide labor market restraints when the bargaining fails. Surface bargaining is a form of bad-faith bargaining which "is often difficult to detect," *Seattle-First Nat. Bank v. NLRB*, 638 F.2d 1221, 1227 n.9 (9th Cir. 1981), because, as we noted in *NLRB v. Cauthorne*, 691 F.2d 1023, 1026 n.5 (D.C. Cir. 1982), the duty to bargain in good faith does not prohibit an "employer's adamant insistence on pro-management terms," and "neither side is required to agree to a proposal or make concessions." Thus it will often be difficult to distinguish bad faith from mere good-faith "adamant insistence" on favorable terms. But whether or not some employers bargain in bad faith, the majority's rule clearly shifts the terms of employers' calculations: entering bargaining confident of their ability to circumvent the constraints of the antitrust laws either through employees' capitulation or through post-impasse unilateral imposition of terms may not be bad faith, but merely a reasonable calculation as to the likely outcome of the negotiation process.

bargaining relationship license unilateral employer imposition of anticompetitive terms. *See* Lee Goldman, *The Labor Exemption to the Antitrust Laws as Applied to Employers' Labor Market Restraints in Sports and Non-sports Markets,* 1989 UTAH L. REV. 617, 658-59 (describing disincentives to collective bargaining if unilaterally-imposed terms are exempt from antitrust coverage). Second, as the majority recognizes, Maj. op. at 28, some employees will be encouraged to decertify their unions rather than risk unilateral multiemployer imposition of terms at impasse. *See also* Goldman, *supra,* at 658-59. Such a consequence is not mere speculation, but represents the actual upshot of the Eighth Circuit's decision in *Powell* upholding a broad nonstatutory labor exemption like that of the majority here. Faced with anticompetitive industry-wide terms forced upon them without their consent, the players in *Powell* promptly responded by terminating union representation. *See Powell v. National Football League,* 764 F. Supp. 1351 (D. Minn. 1991) (recognizing termination of nonstatutory labor exemption when NFL players voted to end union representation in response to *Powell* decision); *The Five Smiths, Inc., et al. v. National Football League Players Ass'n,* No. Civ. 3-90-177 (D. Minn., filed Mar. 30, 1990) (suit by NFL seeking judicial invalidation of players' union decertification). New incentives for employees not to engage in collective bargaining—and the bizarre prospect of employers attempting to force employees to remain in a union so as to preserve the employers' valuable antitrust exemption—run directly contrary to the overarching purpose of the labor laws to encourage bona fide collective bargaining.

The majority seems to suggest that because the labor laws mandate a *process* and not an *agreement,* Maj. op. at 16, 18, we should not be concerned if the rule ends up encouraging more nonagreements than agreements. I do not see how they can be right. "The basic theme of

. . . [the National Labor Relations] Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970). A rule that ousts antitrust law only to encourage fewer collective bargaining agreements seems contrary to the purposes of *both* the labor laws and the antitrust laws.

The majority's rule also creates new assymetries in bargaining relationships still in effect. Employers, now shielded from antitrust liability, can unilaterally impose terms restraining the labor market, while employees have no such capability because unions do not hold sufficient economic power to unilaterally force terms on unwilling employers. *See* Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1424 (1958). Prior to today's ruling, employers and employees could *jointly* agree to restraints on the labor market through collective bargaining agreements, and those restraints would be free from antitrust scrutiny. In that limited sense, employees had the right to bargain away (or waive) their antitrust protection, but always with the prospect of getting something in return. Employers could also acquire antitrust immunity for labor market restraints through the *quid pro quo* of collective bargaining. But today's ruling "effectively gives the party benefitting from a potentially anticompetitive restraint [*i.e.*, employers] . . . the benefit of the antitrust exemption without having to pay for it" through concessions at the bargaining table, Brief of the United States as Amicus Curiae Opposing [sic] *Certiorari* in *NFL v. Powell* ("Amicus br."), at 15. The symmetry, mutality, and give-and-take that lie at the heart of the bargaining process are irretrievably lost.

Under the majority's rule it is clear that a multiemployer agreement setting industry-wide uniform terms of employ-

ment in a single industry— precisely what was prohibited in *Anderson v. Shipowners' Ass'n*—would be exempt from antitrust scrutiny, provided the employers first proposed the scheme in collective bargaining and implemented it after impasse. Until today, the shipowners could immunize those industry-wide terms from antitrust scrutiny only through a collective bargaining agreement; after today, the shipowners need give nothing up in order to get around the antitrust roadblock. Rather than being in a position to demand a *quid pro quo* for their assent to the employers' proposed terms, the employees must now either strike or make concessions to prevent the employers from doing what the antitrust laws would have previously deterred them from doing. The employers thus enter collective bargaining in a stronger position, and the employees enter in a commensurately weaker position. Although strong unions may still be able to successfully fend off employers' unilateral imposition of terms, even the strongest unions are left in a weaker bargaining position after today's ruling. *See* Goldman, *supra*, at 661.

In the end, the wide open field given employers by so broad an exemption from antitrust laws cannot be justified by any rationale based on the requirements of collective bargaining.

IV. "Terms" Versus "Tactics"

The majority's analysis goes astray, I believe, by relying on a too-facile equation of *terms* of employment that restrain the labor market and are unilaterally imposed by employers at impasse, with "bargaining *tactics*," "hard bargaining," and the "economic weapons" used by each side in jockeying for position at the bargaining table. Unilaterally-imposed terms are not mere bargaining tactics. *See* Goldman, *supra*, at 682-83 (distinguishing bargaining "tactics" from unilaterally-imposed "terms" and urging nonstatutory exemption for "tactics" but not for "terms"); Leonard L. Scheinholtz & Kenneth C. Ketter-

ing, *Exemption Under the Antitrust Laws for Joint Employer Activity*, 21 DUQUESNE L. REV. 347, 354 (1983) (distinguishing multiemployer bargaining "tactics" from "terms"). It is true, of course, that "the use of economic pressure by the parties to a labor dispute is . . . part and parcel of the process of collective bargaining," *Insurance Agents*, 361 U.S. at 495, and the Supreme Court itself has suggested that post-impasse unilateral imposition of terms may qualify as an economic pressure tactic, *see American Ship Bldg.*, 380 U.S. at 316 (dicta). Still, the statutory structure of the National Labor Relations Act and the logic of collective bargaining suggest that an employer's right to unilaterally impose terms after impasse is best understood not as a "bargaining tactic" but as part of the employer's residual right to continue operating as dictated by business necessity once her statutory duty to bargain has been exhausted, *see NLRB v. Tex-Tan, Inc.*, 318 F.2d 472, 480-81 & n.20 (5th Cir. 1963). Prior to enactment of the NLRA (and even today outside the collective bargaining context), employers remained free to unilaterally impose new terms of employment at any time; but those unilaterally-imposed terms were subject to antitrust scrutiny. The NLRA, however, restricts an employer's freedom to unilaterally impose terms. The employer's central duty under § 8(a)(5) of the NLRA is to bargain in good faith over mandatory subjects of bargaining. *See* Milton Handler & William C. Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 COLUM. L. REV. 459, 500 (1981). To give substance to that obligation, § 8(a)(5) has been interpreted to prohibit an employer from unilaterally imposing at impasse new terms *not* previously submitted to collective bargaining and rejected by the union, for to do so "is necessarily inconsistent with a sincere desire to conclude a[ ] [collective bargaining] agreement," *NLRB v. Katz*, 369 U.S. 736, 745 (1962). Moreover, because unilateral imposition of new terms during bargaining

"tends to subvert the union's position as the representative of the employees," *Insurance Agents*, 361 U.S. at 485, the employer must observe the status quo while bargaining continues. But after impasse, the employer is free to unilaterally impose terms reasonably encompassed in bargaining proposals already rejected by the union, *Katz*, 369 U.S. at 745, because at that point the employer has *exhausted* its statutory duty to bargain, *Taft Broadcasting*, 163 N.L.R.B. 475, 478 (1967), ("[A]fter bargaining to impasse, that is, *after good-faith negotiations have exhausted the prospects of concluding an agreement*, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals") (emphasis added), *petition for review denied sub. nom. American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968) ("*AFTRA*"); *AFTRA*, 395 F.2d at 628; *NLRB v. McClatchey Newspapers, Inc.*, 964 F.2d 1153, 1157 (D.C. Cir. 1992) (at impasse, "the duty to bargain is at least temporarily suspended, and the parties, typically the employer, may enact any change in a mandatory subject [of bargaining] reasonably contained within its final proposal").

Why then is it necessary, or even helpful in advancing the collective bargaining process, to grant additional antitrust immunity to terms unilaterally imposed by the employer as part of his residual right to conduct his business, *after* he has been relieved of his statutory duty to bargain? I should think that the antitrust interest in unilaterally-imposed industry-wide terms remains as great after impasse, when the employer's duty to bargain over those terms has ceased under the labor laws, as at any other time. Congress could, of course, assign some new, significant *labor law* role to an employer's right to unilaterally impose terms at impasse, such that the terms must be immune from antitrust scrutiny. But the majority can point to nothing in the statute or in its legislative history to support any such intention. *See* Amicus br. at

13. ("The text of the NLRA does not mention the antitrust laws, and the legislative history demonstrates no intent to restrict the preexisting rights of workers as the price of participation in a collective bargaining relationship. . . ."). In short, there is simply no fundamental conflict between the well-established interest of the antitrust laws in preventing employers from unilaterally imposing restraints on the labor market through anticompetitive terms, and the interest of the labor laws in promoting collective bargaining.

Despite the majority's rhetoric, terms of employment unilaterally imposed at impasse bear little resemblance to "bargaining tactics," even extreme ones like strikes and lockouts.[7] Unlike terms of employment, strikes and lock-

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[7] Although the question is not directly at issue in this case, I share the majority's view that if the collective bargaining process is to work without undue interference from antitrust law, multiemployer "bargaining tactics" must fall within the scope of the nonstatutory labor exemption. *See* Maj. op. at 25-26. Although multiemployer bargaining is not expressly authorized by the National Labor Relations Act, neither is it prohibited, and the fact that multiemployer bargaining predates the Act strongly suggests that it was contemplated as part of the collective bargaining process. *NLRB v. Truck Drivers Union Local 449*, 353 U.S. 87, 94-95 (1957) (*"Buffalo Linen"*); *see also Williams*, 45 F.3d at 688. Multiemployer bargaining strengthens the bargaining process not only by facilitating bargaining on the employers' side, *Buffalo Linen*, 353 U.S. at 94-95 and allowing employers to counter "whipsaw" tactics by unions *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404 409-10 & n.3 (1982), but it also makes available joint benefit programs and frees unions from the burden of negotiating separately with many small employers. *Id.* Thus the statutory scheme of the NLRA may well require that employers be exempt from antitrust liability for basic bargaining tactics such as joining multiemployer bargaining units; developing joint bargaining positions jointly proposing and negotiating for those positions; and for joint actions, such as lockouts, aimed at pressuring the union in hopes of securing an agreement. *Cf. Jewel Tea*, 381 U.S. at 713 (Opinion of Goldberg, J.) (suggesting multiemployer bargaining must be exempt from antitrust laws); *Volkswagenwerk v. Federal Maritime Comm'n*, 390 U.S. 261, 287 n.5 (1968) (Harlan, J., concurring) (it is

outs have instrumental value only *within the bargaining context*, as tools to put pressure *on the other bargaining party* to reach an agreement. Strikes and lockouts make sense only as long as hope exists that an agreement may be reached. Unilaterally-imposed terms, however, go well beyond that purpose. Although occasionally displaying ancillary "tactical" significance, unilaterally-imposed terms are inescapably *nontactical* in nature—they are simply the way the employer decides to run his business in the absence of any bargaining agreement. They are not bargaining tactics but the end-product of an unsuccessful bargaining process, addressed not to the other *bargaining party* (the union) but imposed upon the employees because the employer believes they represent good business judgment. Unilaterally-imposed terms, then, are a substitute for an agreement, not a means of reaching one.

Contrary to the majority's contention, Maj. op. at 21, the Supreme Court has repeatedly recognized this fundamental distinction between terms of employment—"the end result of bargaining"—and the "bargaining process" itself, *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 752 (1985). In the analogous context of

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"obvious that the employers are not violating the antitrust laws either when they confer about wage policy preparatory to bargaining or when they sign an agreement"). *See also* Goldman, *supra*, at 674-76 (urging nonstatutory labor exemption for multiemployer bargaining tactics, but not for unilaterally-imposed terms). Indeed there is broad precedent holding multiemployer *tactical* actions directed at the *union* within a collective bargaining framework exempt from antitrust scrutiny. *See, e.g., Amalgamated Meat Cutters & Butchers Workmen, Local No. 576 v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979) (agreement to supply temporary replacement workers to struck employer); *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers of Amer.*, 431 F.2d 1004, 1007 (5th Cir. 1970) (alleged conspiracy to refuse to deal with union), *cert. dismissed*, 404 U.S. 801 (1971); *Newspaper Drivers & Handlers Local No. 372 v. NLRB*, 404 F.2d 1159 (6th Cir. 1978) (mutual lockout agreement), *cert. denied*, 395 U.S. 923 (1969); *Kennedy v. Long Island R. Co.*, 319 F.2d 366, 372-73 (2d Cir.) (multiemployer strike insurance pact), *cert. denied*, 375 U.S. 830 (1963).

implied preemption by the NLRA of state laws setting minimum labor standards, the Court has held that statutes setting substantive limits on *terms* of employment—including terms unilaterally imposed at impasse—do not impermissibly intrude on an employers' "lawful 'tools of economic self-help' available to be utilized as a tactic in collective bargaining," Maj. op. at 22. Earlier cases had established that state laws interfering with the exercise of self-help "economic weapons" in a labor dispute were preempted by federal labor law because they would "frustrate effective implementation of the [National Labor Relations] Act's processes," *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 148 (1976) (quotation and citation omitted); *see also Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) (citing cases). In *Metropolitan Life*, employers advanced the argument—similar to the majority's conclusion here—that this implied preemption also extended to state laws establishing minimum terms of employment, on the theory that the NLRA allows employers and unions to settle terms through free exercise of the "self-help weapon[s]" that form the "balance of power between labor and management expressed in our national labor policy." *Id.* at 750-51 (citation and quotation omitted). The Court roundly rejected the employers' contention that "Congress' ultimate concern in the NLRA was in leaving the parties free to reach agreement about contract terms." *Id.* at 752. Despite the "surface plausibility to appellants' argument" that statutory minimum *terms* interfere with the bargaining *process*, *id.*, the Court said that "[t]he evil Congress was addressing [in enacting the NLRA] . . . was entirely unrelated to local or federal regulation establishing minimum *terms* of employment," and there is "[n]o incompatibility" between the purpose of NLRA to "restore the equality of bargaining power, and "state or federal legislation that imposes minimal substantive requirements on contract *terms* . . . ." *Id.* at 75 (emphasis added).

In a subsequent case, *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), the Court held that a state statute setting minimum terms *in the absence of a collective bargaining agreement* was not preempted by the NLRA. In *Fort Halifax*, a Maine statute provided that employers and employee could alter severance pay terms from the statutory minimum through collective bargaining agreements; but *once bargaining reached impasse*, the statutory minimum terms applied. Employers again complained that the statute interfered with the collective bargaining process (including presumably their right to impose terms unilaterally at impasse), but the Court held that the statute "does not impermissibly intrude upon the collective bargaining process."[8] *Id.* at 23. As the Court explained:

> Both employers and employees come to the bargaining table with rights . . . that form a "backdrop" for their negotiations (citation omitted). Absent a collective-bargaining agreement, for instance, state common law generally permits the employer to run the workplace as it wishes. . . . The parties may enter negotiations designed to alter this state of affairs, but, if impasse is reached, the employer may rely on pre-existing state law to justify its authority to make employment decisions; that same state law defines the rights and duties of employees. . . . If impasse is reached, . . . preexisting state law determines the right[s] of employees. . . .

Id. at 21.

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[8] *Fort Halifax* thus contradicts the majority's contention, Maj. op. at 22, that this case is controlled by dicta in *American Ship-Building*, 380 U.S. at 316, naming unilateral imposition of terms among the employers' "tools of economic self-help." Even if we are bound by the *American Ship Building* dicta, *Fort Halifax*—decided later—rejects the implication the majority would draw, that any independent statutory limitation on the terms an employer may impose at impasse impermissibly interferes with the employer's exercise of self-help tools.

The principles of *Metropolitan Life* and *Fort Halifax* apply here. Federal antitrust law forms a "backdrop" against which collective bargaining takes place. The nonstatutory labor exemption allows employers and employees to alter these standards through collective bargaining agreements; but at impasse, preexisting antitrust rights apply. Here, just as in *Metropolitan Life* and *Fort Halifax*, the substantive limitations placed on *terms* of employment do not impair the collective bargaining *process*, even though they may limit employers' ability to impose the terms of their choice unilaterally at impasse.

In some cases, we are told, impasse " 'is eventually broken, either through a change of mind or the application of economic force,' " and impasse "may be 'brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process.' " *Bonanno Linen*, 454 U.S. at 412 (quoting *Charles D. Bonanno Linen Serv., Inc.*, 243 N.L.R.B. 1093, 1093-94). But even if unilateral imposition of terms at impasse may *sometimes* have tactical significance, the majority's rule sweeps much too broadly, immunizing unilaterally-imposed terms whether or not they are used as a bargaining tactic; whether or not they break an impasse or otherwise promote further bargaining; and regardless of how identical terms, imposed for identical reasons, would fare under the antitrust laws in the absence of failed collective bargaining.

The present case offers a striking illustration of how employers may now execute an end run around the antitrust laws. Here, there is no indication that the employers' unilateral imposition of a fixed salary of $1,000 per week on rookie and first-year developmental squad players was a "tactic" or "economic weapon" aimed at bringing an intransigent union back to the bargaining table. The employers frankly admitted they wanted a $1,000 fixed salary for developmental squad players to

save money, and because they could not enforce existing prohibitions against "stashing" players on the injured reserve list. Thus their primary *purpose* for unilaterally imposing the fixed salary had nothing to do with tactical advantages in the bargaining process or pressuring the union to resume bargaining. They basically thought the new terms were a better way to run their business. The purpose, effect and content of their unilaterally-imposed terms would have been the same had there been no union in the picture at all.

V. Striking the Balance Between Antitrust and Labor Law

The majority suggests that without the rule adopted today employees will rely on antitrust litigation to secure gains they could not win at the bargaining table but were unwilling to strike over. Maj. op. at 18-19. That argument is a nonstarter.

First, the majority's rule applies whether or not the employees strike. Second, denying employers antitrust exemption for unilaterally-imposed terms does not place any new offensive plays in the employees' playbook. Rather, it affords them a defense against unilateral employer actions that offend antitrust principles. Preserving antitrust protection does not guarantee unions a win at impasse because multiemployer bargaining units still have many other options.[9] They can maintain the status quo, and employ economic pressure tactics such as joint lockouts, *Buffalo Linen*, 353 U.S. at 97, or hiring temporary

[9] In that sense, this case is distinguishable from *Williams*, where employees mounted an antitrust challenge to employers' maintenance of the status quo after expiration of a collective bargaining agreement. There, the employers' labor law duty to maintain the status quo squarely conflicted with their alleged antitrust duty *not* to maintain the status quo. Rather than deciding the case on that narrow issue, however, the *Williams* court announced a broad ouster of antitrust law, similar to the majority's here.

replacements for strikers, *NLRB v. Brown*, 380 U.S. 278, 284 (1965). A multiemployer group can be disbanded (by mutual consent with the union) upon the failure of bargaining, and each employer can resume bargaining separately. Although generally not free to unilaterally withdraw from the multiemployer bargaining unit absent "unusual circumstances," individual employers are still free to negotiate interim agreements with the union, *Bonanno Linen*, 454 U.S. at 413. Finally, even if the multiemployer group does proceed to unilaterally impose anticompetitive terms, thereby courting an antitrust lawsuit, the outcome of that litigation is far from a foregone conclusion under a rule-of-reason balancing. Under any of these scenarios, employees will be hard-pressed to gain an easy victory. Indeed, the range of choices left to employers without post-impasse antitrust immunity more closely tracks the "delicate balance" of the collective bargaining process as we now know it, than any wholesale exemption such as that announced by the majority today.

For all these reasons, I would hold ultimately, in accord with the district court, that terms of employment unilaterally imposed by employers after impasse are *not* exempt from antitrust scrutiny under the nonstatutory labor exemption.[10] Under our rule, the symmetry and mutuality of the bargaining process are preserved. Either side may propose and bargain for terms restraining the labor market, but can win those restraints only at the bargaining table by making concessions and securing agreement from the opposing side. Incentives to bargain

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[10] In reaching this conclusion, I do not find it necessary to reach some closely-related questions that have arisen in other cases. The most important of these is when, if at all, the nonstatutory labor exemption attaching to a collective bargaining *agreement* ends—at expiration of the collective bargaining agreement, at impasse, or at some other post-impasse point. Since the employees never agreed to the labor market restraints at issue here in the first place, no such questions arise in this case.

remain. But at the point of impasse—when an agreement is no longer in sight or even being sought—immunity from antitrust liability for terms employers unilaterally impose should terminate. Extending antitrust immunity undercuts the substantial interests of antitrust law in protecting the freedom of the labor market, and serves no ascertainable purpose within the collective bargaining framework.

This outcome, I believe, accomplishes a superior balancing of the competing interests of antitrust principles whenever any aspect of labor law enters the scene, it preserves antitrust protection alongside the collective bargaining process in situations where they do not fundamentally conflict. *Cf. Silver v. New York Stock Exchange*, 373 U.S. at 357 ("the proper approach [to resolving conflict between antitrust laws and a competing statutory scheme] . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted"). And it better comports with our duty to construe implied antitrust exemptions narrowly; the majority's global interpretation of the nonstatutory exemption goes far beyond what is necessary to make the collective bargaining process work. *Cf. id.* Finally, because it preserves the symmetry, mutuality, and balance of the collective bargaining process as crafted by Congress over the past 60 years, it more faithfully follows the design of our labor laws as well.

With time running out in a bitterly fought scoreless tie, this court would allow the owners an unearned critical fifth down.

I respectfully dissent.

APPENDIX B

[Filed Jun. 12, 1995]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-7165

ANTONY BROWN, *et al.*,
Appellees,

v.

PRO FOOTBALL, INC. d/b/a
WASHINGTON REDSKINS, *et al.*,
Appellants

and Consolidated Case

BEFORE: Edwards, Chief Judge; Wald and Randolph, Circuit Judges

ORDER

Upon consideration of appellees' petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Wald would grant the Petition for Rehearing.

[Filed Jun. 12, 1995]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-7165

ANTONY BROWN, *et al.*,
Appellees,

v.

PRO FOOTBALL, INC. d/b/a
WASHINGTON REDSKINS, *et al.*,
Appellants

and Consolidated Case

BEFORE: Edwards, Chief Judge; Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, Circuit Judges

ORDER

Appellees' Suggestion For Rehearing *In Banc* and the brief of the United States in support thereof have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular, active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *in banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

A statement of Circuit Judge Tatel concurring in the denial of rehearing *in banc* is attached.

Circuit Judge Wald would grant the suggestion. A statement by Judge Wald is attached.

WALD, *Circuit Judge*: I would grant the petition for rehearing *in banc* for the reasons set out in my panel dissent. I believe further that the case involves a significant issue of statutory accommodation between two premier pieces of legislation incorporating our national policies on labor relations and competition and as such merits final resolution by the Supreme Court.

Statement of Circuit Judge Tatel:

This case presents antitrust and labor issues of national significance. The issues have been fully engaged and developed by the majority and dissenting opinions. Supreme Court review is essential to the resolution of these issues. *See* Sup. Ct. R. 10.1(c).

APPENDIX C

[Filed Jun. 4, 1991]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-1071
(RCL)

ANTONY BROWN, *et al.*,
Plaintiffs,
v.

PRO FOOTBALL, INC., d/b/a
WASHINGTON REDSKINS, *et al.*,
Defendants.

MEMORANDUM OPINION

(Striking Nonstatutory Labor Exemption Defense)

This case comes before the court on plaintiffs' motion to strike defendants' nonstatutory labor exemption defense or for partial summary judgment ("Plaintiffs' Motion to Strike"), defendants' motion for summary judgment as to the nonstatutory labor exemption ("Defendants' Motion for Summary Judgment"), and the parties' respective oppositions and replies. After consideration of all the filings, arguments, and authorities presented by both parties in their filings and at oral argument, the court will grant Plaintiffs' Motion to Strike and will deny Defendants' Motion for Summary Judgment.

I. FACTS

Plaintiffs in this action are professional football players who played on developmental squads of the twenty-eight National Football League teams during the 1989 regular

and post-season. By court order, plaintiffs have been certified as a class for purposes of the present case.[1] Defendants are each of the twenty-eight teams which comprise the National Football League and the National Football League ("NFL"), itself.

On February 23, 1989, the NFL's Long Range Planning/Finance Committee discussed the framework for establishing developmental squads of up to six players for each of the NFL teams. Plaintiffs' Statement of Material Facts Not in Genuine Dispute and Supporting Exhibits ("Plaintiffs' Exhibits") at 4. The developmental squad was a new concept which, under the terms of 1989 Resolution G-2 ("Resolution G-2"), would permit each NFL team to sign rookie and first year free agents to services contracts for the 1989 NFL season. *See* 1989 Resolution G-2 at Plaintiffs' Exhibits at 5. At its annual meeting on March 22, 1989, the NFL, *inter alia,* voted to adopt Resolution G-2 and to amend the NFL Constitution and Bylaws accordingly. Under the terms of Resolution G-2 the NFL teams would be able to sign developmental squad players beginning September 5, 1989. *Id.*

The present case and the motions currently before the court involve the compensation terms of Resolution G-2, which provided that developmental squad players would be paid a fixed salary instead of being permitted to negotiate their own salaries. While Resolution G-2 established that developmental squad players would receive one fixed weekly salary, the amount to be paid was left blank. On April 7, 1989, Jack M. Donlan, Executive Director of the NFL Management Council sent a letter and a copy of Resolution G-2 to Eugene Upshaw, representive of the NFL Players Association ("NFLPA"). The letter informed Upshaw of the NFL's adoption of Resolution G-2 and suggested an April meeting "to negotiate the terms

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[1] Named plaintiffs include Antony Brown, James Bishop, John Buddenberg, Gary Couch, Craig Davis, Matthew J. Jaworski, Ricky Andrews, and Wesley Pritchert.

and conditions applicable to developmental squad players." Plaintiffs' Exhibits at 6. On April 29, 1989, James A. Conway, Assistant Executive Director and General Counsel of the NFL Management Council wrote a letter to Richard A. Berthlesen, of the NFPLA, summarizing a telephone conservation between the two in which they briefly discussed developmental squads and requesting a face-to-face meeting in early May to discuss salary and benefit terms for developmental squad players. *Id.* at 7.

On May 17, 1989, the Executive Committee of the NFL Management Council agreed to pay developmental squad players a fixed salary of $1,000 per week. *Id.* at 8, ¶ 14. On May 18, 1989, Donlan sent Upshaw a letter again indicating the NFL Management Council's desire to meet to negotiate the terms and conditions applicable to developmental squad players and specifically proposing, *inter alia,* the following modification to the 1982 Collective Bargaining Agreement:

> Article XXII, *Salaries,* shall not apply, In lieu thereof, establish special services contract providing for salaries of $1,000 per week, prorated on a daily basis.

Id. at 9. On May 30, 1989, Upshaw faxed a letter to Donlan indicating the NFLPA's position that developmental squad players must have the right to negotiate their own salaries. *Id.* at 10. The fax also suggested a discussion of Resolution G-2 when the parties were to meet the following week. *Id.* On June 16, 1989, Donlan sent a letter to various members of one of the NFL committees summarizing the results of a meeting between the NFL and the NFLPA. *Id.* at 12. The letter indicated that the NFLPA would not agree to the plan to pay developmental squad players a fixed salary and insisted that those players be given the right to negotiate their own salaries. *Id.* In the letter, Donlan concluded that "[f]or implementation purposes, the [developmental squad] issue is clearly at an impasse." *Id.*

On June 30, 1989, Donlan sent Upshaw a letter suggesting a meeting during the second week in July. *Id.* at 15. Attached to the letter was a draft developmental squad contract. *Id.* On June 30, 1989, Donlan also wrote a file memorandum indicating that it was his understanding that the NFLPA would never accept a contract for the developmental squad players in which they were not permitted to negotiate their own salaries. *Id.* at 16. On July 6, 1989, Upshaw sent Donlan a letter which stated the NFLPA's position that "all players, including developmental, should have the right to negotiate salary terms, and that no fixed wage for any group of players is acceptable to the NFLPA." *Id.* at 18. In this letter, Upshaw also indicated that the NFLPA rejected the conditions suggested for developmental squad players which the NFL presented to the NFLPA and which included a fixed salary of $1,000 per week. *Id.*

On August 14, 1989, Conway sent a final version of the draft Developmental Player Contract to Upshaw with a letter attached indicating that the NFL was "available for negotiations on this and other issues anytime." *Id.* at 22. On September 5, 1989, the day NFL teams began signing developmental squad players, NFL Commissioner Pete Rozelle circulated a memorandum to all NFL teams reminding them that "weekly compensation to be paid to Developmental Squad Players is $1,000. Individually negotiated terms above or below $1,000 are not permitted." *Id.* at 28. The memorandum indicated that any other form of compensation or benefit, such as per diem and housing arrangements, was impermissible. *Id.* On October 17, 1989, Upshaw sent a letter to Donlan in response to one received from Donlan. In this letter, Upshaw stated the NFLPA view that the developmental squad salary cap "violates the law." *Id.* at 31. Plaintiffs, through the NFLPA, filed the present suit on May 9, 1990.

II. LEGAL STANDARDS

Plaintiffs have moved to strike defendants' nonstatutory labor exemption defense. Under Rule 12(f) of the Federal Rules of Civil Procedure, the court "may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Plaintiffs have moved, in the alternative, for partial summary judgment on the nonstatutory labor exemption defense. Because the court has considered matters outside the pleadings, the court will consider plaintiffs' motion under Rule 56(c), which indicates that summary judgment is appropriate when examination of the record as a whole reveals "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In examining the record, the court must view all inferences in the light most favorable to the nonmoving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In order to determine whether to grant plaintiffs' motion for partial summary judgment, the court must address the nonstatutory labor exemption and its place within the collective bargaining process in the context of the present case.

III. ANALYSIS

A. *Background*

The purpose of collective bargaining is to enable employers and unions to resolve disputes among themselves without having to resort to the courts. One court has noted that the:

> labor arena is one with well established rules which are intended to foster negotiated settlements rather than intervention by the courts. The League and the Players have accepted this "level playing field" as the basis for their often tempestuous relationship, and we believe that there is substantial justification for requiring the parties to continue to fight on it,

> so that bargaining and the exertion of economic force may be used to bring about legitimate compromise.

Powell v. National Football League, 888 F.2d 559, 567 (8th Cir. 1989), *cert. denied* 111 S. Ct. 711 (1991).

The NFLPA is a labor organization under the terms of 29 U.S.C. § 152(5) and has exclusive bargaining rights for all NFL players. *See* 29 U.S.C. § 159(a) (1973). This exclusive bargaining right extends to developmental squad players insofar as they are potential NFL players: "[n]ot only present but potential future players for a professional sports league are parties to the bargaining relationship." *Zimmerman v. National Football League*, 632 F. Supp. 398, 405 (D.D.C. 1986), citing *Wood v. National Basketball Association*, 602 F. Supp. 525 (S.D.N.Y. 1984). Potential NFL players, such as the developmental squad players in the present case, are part of the collective bargaining relationship betwen the NFL and the NFLPA for purposes of the nonstatutory labor exemption. *Zimmerman v. National Football League*, 632 F. Supp. at 405.[2]

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[2] The status of plaintiffs in this case is not affected by a decision issued by a United States District Court in Minnesota which held that the NFLPA was no longer involved in a collective bargaining relationship with the NFL. *Powell v. NFL*, No. 4-87-917 (D. Minn. filed May 29, 1991). The negotiations between the NFL and NFLPA in the present case and the NFL's implementation of the developmental squad concept preceded the actions in *Powell* upon which the District Court in Minnesota based its present holding. The Minnesota District Court's holding suggested that the NFLPA's status as the players' collective bargaining representative ended on December 5, 1989—after all communications between the NFL and NFLPA on the developmental squad issue had ended and after the NFL implemented the developmental squad concept. Both parties agreed that the issue of the NFLPA's renunciation of its bargaining rights is not material to this case because all conduct material to this case occurred prior to the NFLPA's renunication. Plaintiffs' Statement Of Material Facts Not In Genuine Dispute at ¶ 4; Defendants' Response to Plaintiffs' Statement Of Material Facts Not In Genuine Dispute at ¶ 4.

In 1977, the NFL and the NFLPA entered into a collective bargaining agreement. After the 1977 Collective Bargaining Agreement expired, the parties adopted the 1982 collective bargaining agreement, which itself expired in August 1987. Currently there is no collective bargaining agreement in effect. After a collective bargaining agreement expires, both the union and the employer have a continuing obligation to bargain. National Labor Relations Act, 29 U.S.C. § 158(a)(5) & (d) (1982); *see NLRB v. Katz*, 369 U.S. 736, 742-43 (1962). Employers are obligated to maintain the status quo as to wages and working conditions created by a previous collective bargaining agreement before the parties reach "impasse" in negotiations. *Powell v. National Football League*, 888 F.2d at 565 (citations omitted).

During the life of a collective bargaining agreement, the nonstatutory labor exemption shields both employers and labor unions from antitrust liability for restraints which involve mandatory subjects of collective bargaining[3] found in the collective bargaining agreement. If not included in a collective bargaining agreement such restraints would subject the employer to liability under the antitrust laws. *Powell v. National Football League*, 888 F.2d at 562; *Mackey v. National Football League*, 543 F.2d 606, 612 (8th Cir. 1976); *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 847 n.14 (3rd Cir. 1974) ("to preserve the integrity of the negotiating process, employers who bargain in good faith must be entitled to claim the antitrust exemption"). The "availability of the nonstatutory exemption for a particular agreement turns upon whether the relevant federal labor policy is deserving of pre-eminence over federal antitrust policy under the circumstances of the particular case." *Mackey v. National Football League*, 543 F.2d at 613.

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[3] Under the NLRA, mandatory subjects of collective bargaining include "wage, hours, and other terms and conditions of employment . . . ." 29 U.S.C. § 158(d) (1973); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958).

The nonstatutory labor exemption is a narrow exception to antitrust liability. The purpose of that exemption is to effect an "accommodation between the congressional policy favoring collective bargaining under the National Labor Relations Act and the congressional policy favoring free competition in business markets . . . ." *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621-22 (1975). This accommodation "requires that some *union-employer agreements* be accorded a limited nonstatutory exemption from antitrust liability." *Id.* (emphasis added).

While the nonstatutory labor exemption normally applies to protect employers from antitrust liability where a collective bargaining agreement exists, some courts have extended that exemption beyond expiration of a collective bargaining agreement. The Court of Appeals for the District of Columbia Circuit has stated that "provisions of [an] expired collective-bargaining agreement that relate to mandatory subjects [of collective bargaining] are said to survive the agreement's expiration." *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1113 (D.C. Cir. 1986). Wages being one of the mandatory subjects of collective bargaining, an "expired collective bargaining agreement continues to define the status quo as to wages and working conditions and the employer is required to maintain the status quo until the parties negotiate to a new agreement or bargain in good faith to impasse." *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982) (citations and internal punctuation marks omitted). The Supreme Court has stated that the purpose of extending the terms of a collective bargaining agreement beyond expiration is to promote industrial peace "by fostering a non-coercive environment that is conducive to serious negotiations on a new contract." *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.5 (1988), *quoting NLRB v. Katz*, 369 U.S. 736, 743 (1962).

In citing a case from this circuit, the Supreme Court has noted that "after bargaining to an impasse . . . an employer does not violate the [National Labor Relations] Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals." *Id.*, 484 U.S. at 544 n.5, citing *American Federation of Television & Radio Artists v. NLRB*, 395 F.2d 622, 624 (D.C. Cir. 1968). In *Laborers Health & Welfare Trust Fund*, the Supreme Court did not say that such unilateral changes, whether before or after impasse, would not violate the antitrust laws.[4]

B. *Nonstatutory Labor Exemption Ends At Expiration.*

The present dispute raises one principal issue for the court to resolve: whether the nonstatutory labor exemption shields the NFL from antitrust liability for its having implemented the uniform salary provisions in the developmental squad player contracts during the 1989 NFL season. This court holds that the NFL's implementation of the salary provisions of Resolution G-2 is not shielded by the nonstatutory labor exemption because that exemption expired when the 1982 Collective Bargaining Agreement expired in 1987.

While this court recognizes the precedent which establishes that the nonstatutory labor exemption survives expiration of a collective bargaining agreement, this court questions the wisdom of continued application of that court-made doctrine beyond expiration due to the fact that such an exemption hinders rather than facilitates the execution of new collective bargaining agreements. The

[4] It is important to note that the *American Federation* case cited by the Supreme Court involved a labor dispute in which there was a collective bargaining agreement in effect and that the employer sought to change mandatory subjects already encompassed in that *existing* agreement. The present case involves an expired collective bargaining agreement where the employer seeks the shelter of the nonstatutory exemption for new terms involving mandatory subjects that were never part of the expired agreement.

present case provides a good example. The NFL and NFLPA signed a collective bargaining agreement in 1982. That agreement expired in 1987. It is now 1991 and the parties have not negotiated a new collective bargaining agreement. The court has no indication as to when the parties will execute a new agreement. For the past four years, by continuing to hold parties to the terms of the expired collective bargaining agreement, courts have been treating the parties as if they had a current agreement. Such treatment results not from any legislation or express assent of the parties, but from a judicial fiction ostensibly fashioned to promote the negotiation of a new collective bargaining agreement with terms mutually acceptable to both parties.

Unfortunately, the nonstatutory labor exemption actually provides a disincentive for the NFL to sign a new collective bargaining agreement. If the NFL is satisfied with the terms in the expired agreement, all it need do is maintain the status quo and continue to receive exception from antitrust liability for restraints to which the union no longer agrees. As mentioned earlier, the stated purpose of extending the terms of an expired collective bargaining agreement was to foster a "non-coercive environment that is conducive to serious negotiations on a new contract. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. at 544 n.5, *quoting NLRB v. Katz*, 369 U.S. at 743. Rather than creating an atmosphere conducive to serious negotiations, extension of the terms of an expired collective bargaining agreement and the nonstatutory labor exemption beyond expiration of the agreement actually discourages serious negotiations on a new collective bargaining agreement. As long as the employer is satisfied with the status quo, that employer has no incentive to negotiate a new agreement. Moreover, such an extension apparently removes the firm deadline necessary for fruitful negotiation. The certainty that treble damages under the antitrust laws would attach after a date certain would create

the atmosphere of economic certainty and urgency necessary for the parties to negotiate seriously and sign a new collective bargaining agreement.

In *Powell v. National Football League,* 888 F.2d at 564, a panel of the Eighth Circuit noted an NFL concern that expiration of the nonstatutory labor exemption at impasse would motivate the NFLPA to reach impasse so it could sue for treble damages under the antitrust laws. The NFL's concern supports this court's position that the nonstatutory exemption, and, necessarily, the terms of the collective bargaining agreement, should end at expiration of that agreement. Such an endpoint is rational given that the continued recognition of the terms and application of the exemption after expiration permits the NFL to commit antitrust violations where there is no actual union consent to exempt those otherwise unlawful restraints from application of the antitrust laws. Because union consent is a prerequisite for the exemption to apply, this court cannot find that the exemption can apply where union consent is absent.

The unions have every right to seek treble damages for unlawful NFL antitrust restraints. It is this court's view that the NFL's antitrust liability should attach at expiration of the collective bargaining agreement, not at some indeterminate point beyond expiration which is labelled "impasse." Antitrust exemption should end at expiration because the reason for the exemption no longer exists; the union no longer agrees to the restraint and therefore continuation of the restraint violates the Sherman Act. Moreover, extension beyond expiration of the collective bargaining agreement breeds uncertainty for the parties and the courts and also inhibits negotiation on a new collective bargaining agreement. If the terms and the nonstatutory exemption don't end at expiration, parties don't have deadlines after which they can be certain that antitrust liability properly applies. Without such certainty, no new agreement will be executed.

Without an endpoint at expiration, the terms of a collective bargaining agreement and the applicability of the nonstatutory labor exemption remain in perpetual limbo. Even if a court were to set expiration at impasse, this would not foster execution of a new collective bargaining agreement [5] or remove any uncertainty because courts would still have to determine the existence of "impasse" and whether court intervention at that point would be appropriate—determinations as to which different courts will likely differ.[6]

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[5] Ethan Lock, who has written in depth on the issue before the court, has noted that:

> simultaneous expiration of the agreement and the labor exemption undoubtedly would have had an impact on the parties' relative leverage in collective bargaining. At a minimum, such a result would have forced the parties to engage in meaningful negotiations at an earlier time and, in the absence of agreement, precipitated a quicker resolution of the merits of the pending lawsuit[s].

Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 Duke L.J. 339, 400 [hereafter referred to as "Lock, *The Scope of the Labor Exemption*"].

[6] As will be discussed more fully below, the Supreme Court has described impasse as a recurring feature of collective bargaining which is often broken when either party brings various economic forces to bear in order to break the impasse. As such, when presented with an impasse claim, the NLRB or the courts would not only have to determine whether impasse occurred, but whether, if so, court or NLRB intervention at this point is premature given the parties respective economic forces which can help the parties break the impasse and resolve their own differences. Lock has noted that "Congress designed the procedural framework of the NLRA to ensure that employers and employee representatives will make an honest effort to resolve their differences at the bargaining table. Congress clearly intended the parties involved in a collective bargaining relationship to resolve their own disputes." Lock, *The Scope of the Labor Exemption* 1989 Duke L.J. at 382 (citations omitted).

One court has added a new level of uncertainty to application of the nonstatutory exemption beyond expiration by holding that an employer can impose a restraint after expiration only if the

Ending the nonstatutory exemption at expiration honors the overall policy goal of the labor laws which is to foster negotiated agreements between labor and employers. This policy is not being furthered by the law as it stands today. One court, jurisdictionally bound by *Powell v. National Football League*, 888 F.2d 559, which extended the nonstatutory labor exemption beyond impasse, recently held the nonstatutory exemption inapplicable to NFL action because the NFLPA had given up its role as the collective bargaining agent for NFL players. *Powell v. National Football League*, No. 4-87-917 (D.Minn. May 28, 1991). This court is not bound by the Eighth Circuit's holding in *Powell* and will not follow it. This court does not believe that this nation's labor policy, as discussed in this opinion, requires a union to give up its rights as the bargaining agent for employees in order to escape application of the terms of an expired collective bargaining agreement and reinstate the NFL's liability under the antitrust laws. Certainly such a measure does not promote the negotiation of collective bargaining agreements or labor peace. *See Powell v. National Football League*, 888 F.2d at 574 (Lay, Chief J., dissenting from denial of rehearing *en banc*) ("the union should not be compelled, short of self-destruction, to accept illegal restraints it deems undesirable"); *id.* at 570 (Heaney, J., dissenting) ("end result of majority opinion is that once a union agrees to a package of player restraints, it will be bound forever unless the union forfeits its bargaining rights").

Extending the nonstatutory labor exemption beyond expiration also deprives labor of an important bargaining

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employer "reasonably believes that the [restraint] or a close variant of it will be incorporated in the next collective bargaining agreement." *Bridgeman v. NBA*, 675 F. Supp. 960, 967 (D.N.J. 1987). Not only does this disregard the fact that the union has not agreed to the restraint, it requires courts to make the determination of whether the employer believed the restraint would be incorporated in a subsequent agreement, and whether such belief was "reasonable." Again, different courts, given the same facts, will reach different conclusions.

right and impinges on labor's freedom of contract. The threat of treble damages under the antitrust laws is one of union's economic weapons in its collective bargaining arsenal. Exempting employers from application of the antitrust laws in the absence of a collective bargaining agreement deprives unions of a statutorily created bargaining chip in the negotiating process. This chip may well be labor's strongest weapon insofar as labor has the power to subject employers to great economic risk under the antitrust and labor laws for activities which Congress has determined are unlawful restraints. This economic force is a lawful chip the union has to induce employers to reach agreement on collective bargaining terms so that the exemption would apply.

At the same time, extension of the nonstatutory labor exemption beyond expiration of the collective bargaining agreement is inconsistent with the primary policy behind the labor laws and the nonstatutory labor exemption. As discussed earlier, that goal is to promote the execution of new collective bargaining agreements. Under the nonstatutory labor exemption, employers are exempt from certain applications of the antitrust law. Such exemption is consistent with the policies behind labor laws and the exemption which together seek to encourage employers and unions to agree on terms relating to conditions of employment. Terms included within a collective bargaining agreement are protected. Extension of the exemption beyond expiration of that agreement frustrates the relevant policies because it treats the parties as if there is a collective bargaining agreement when in fact there is none. If the parties have not expressly agreed to terms relating to conditions of employment, this court can find no discernible justification for granting the employer any exemption from the antitrust laws. To do so would reward employers simply for being part of a collective bargaining relationship where employers and labor had at one time agreed on terms relating to conditions of employment.

This court agrees with Lock's conclusion that an "employer should be exposed to antitrust liability for continuing to enforce a provision that violates the Sherman Act if the union has ceased to consent to that provision. Such a provision is immunized *only* by the union's consent." Lock, *The Scope of the Labor Exemption,* 1989 Duke L.J. at 376. By failing to expressly continue the terms of an expired collective bargaining agreement, the union has ceased to consent to the terms therein. Neither does the NLRA nor should the courts "dictate the substantive terms of any bargain between the parties." *Id.* at 382 (citations omitted). On this subject, Lock has stated that an:

> employer should not be permitted to use the status quo doctrine to shield otherwise illegal provisions that the union no longer desires. The fact that the restraint was previously subject to good faith negotiations is relevant to an employer's obligation to maintain the status quo; previous good-faith negotiations are not relevant to the application or nonapplication of the labor exemption once the agreement has expired. Upon expiration of the agreement, an employer either should be forced to comply with the antitrust laws or willing to negotiate away benefits in return for the unreasonable restraint. The [NFL] owners' argument that such a result creates an unjustifiable shift in bargaining leverage is difficult to accept. The union *should* have leverage to modify or eliminate an illegal restraint it determines is no longer in its best interest.

Id. at 391. If the union does not have the power to eliminate a once agreed to restraint, "an agreement to a particular *unreasonable* restraint for a finite period operates to waive, indefinitely or permanently, a party's rights under the antitrust laws. In short, the players' rights under the antitrust laws lie, after the agreement has expired, in the hands of the owners." *Id.* at 393. This

court does not believe that a union, by signing a collective bargaining agreement, can be required to be governed by its terms, absent express approval, after that agreement has expired.

Extension of the nonstatutory exemption beyond expiration of the collective bargaining agreement also deprives unions of their right to bind themselves through a contract, for a limited duration only, to restraints that would otherwise be unlawful under the Sherman Act. Courts infringe on this right when they fashion an exemption for those restraints which shield employers indefinitely beyond expiration of the collective bargaining agreement. Through extension of the nonstatutory labor exemption beyond expiration, courts impose indefinite restraints on unions which the unions only agreed to for periods of time indicated in the collective bargaining agreement. In his article, Lock noted that the right to contract is

> one of the most fundamental rights established under the NLRA [and that it enables] the parties . . . to establish through good faith negotiations the terms of their own agreement. This right necessarily incorporates the freedom of contract. In fact, freedom of contract is so fundamental that the parties may agree in certain instances on unreasonable restraints of trade. The freedom to contract also enables the parties to determine the length of their agreement.

Id. at 394 (citations omitted). Through the nonstatutory labor exemption, courts actually deprive labor of their right to contract as to an integral contract term: duration.

Ending the nonstatutory labor exemption and the terms of a collective bargaining agreement at expiration of the agreement provides a bright line for the parties to take into the bargaining room and for the NLRB and courts to rule from when presented with exemption disputes. Such a bright line would extricate courts from the morass the current state of the law has produced and is consistent

with the policies embodied in the labor and antitrust laws as well as the judicially created nonstatutory labor exemption.[7]

C. *Nonstatutory Labor Exemption Does Not Extend Beyond Impasse.*

Alternatively, the NFL's action is not shielded from antitrust liability in the present case because, even assuming that the nonstatutory labor exemption extends beyond expiration of the collective bargaining agreement and that the parties bargained in good faith to impasse, this court holds that the nonstatutory labor exemption does not extend antitrust liability protection beyond impasse after a collecive bargaining agreement has expired.

Under the three part test established by the Eighth Circuit in *Mackey v. NFL,* 543 F.2d 606, the nonstatutory labor exemption is implicated in the present case. In *Mackey,* the Eighth Circuit established a three part test to determine whether the nonstatuory labor exemption should apply:

> First, labor policy favoring collective bargaining may potentially be given preeminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. . . . Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. . . . Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.

Id. at 614 (citations omitted).

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[7] This court believes that the decision to extend any labor exemption beyond expiration of collective bargaining agreements is an issue properly left to Congress to resolve.

The present case satisfies all three prongs. First, the developmental squad salary restraint primarily affected only the parties to the collective bargaining relationship: the NFL employers and prospective NFL employees. Second, the salary terms at issue in this lawsuit are mandatory subjects of collective bargaining. 29 U.S.C. § 158 (d); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). Third, assuming, for purposes of this part of the court's opinion, that the salary provisions in the present dispute were encompassed in the expired collective bargaining agreement, the parties did bargain at arm's length and in good faith to impasse. The parties met face-to-face on one occasion, had several telephone conversations, and exchanged correspondence delineating their respective positions on numerous occasions between March 22, 1989, when the NFL adopted Resolution G-2, and September 5, 1989, the effective date of developmental squad formation. The positions of both the NFL and NFLPA were clear; the NFL wanted a fixed salary for all developmental squad players; the NFLPA would not accept any terms which did not afford developmental squad players the right to negotiate their own salaries.

The fact that neither the NFL nor the NFLPA changed their respective positions regarding the developmental squad salary terms during the five month period does not suggest the absence of good faith bargaining. During collective bargaining, no party is required to agree to a proposal or to make a concession. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 106 (1970).

The fact that neither party relented from its original bargaining position supports the conclusion that the NFL and NFLPA had negotiated to "impasse." The Supreme Court has accepted the following definition of impasse: "that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless . . . ." *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484

U.S. at 543 n.5 (citations omitted). The Supreme Court has also noted that impasse is "only a temporary deadlock or hiatus in negotiations" and "a recurring feature in the bargaining process . . . which in almost all cases is eventually broken, through either a change of mind or the application of economic force." *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1982) (citations and quotation marks omitted). The "economic force" which parties can apply includes strikes, lockouts, pickets, and the hiring of replacement workers. *See e.g.* 29 U.S.C. § 104 (listing some permissible union activities during labor disputes which cannot be subjected to restraining order or injunctions).

At impasse, the NFL implemented the developmental squad concept, including the fixed salary provisions. Because this court finds that the nonstatutory labor exemption to the antitrust laws does not extend beyond impasse, the NFL may be held liable for imposing the developmental squad salary restraint. This court understands the policy behind extending antitrust protection for restraints contained in a collective bargaining agreement beyond expiration. In theory, the purpose of such extension is to facilitate negotiation of a new collective bargaining agreement: "[f]reezing the status quo ante after a collective bargaining agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract." *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. at 544. *See NLRB v. Cauthorne*, 691 F.2d at 1025 (expired collective bargaining agreement defines, and employer must maintain, status quo as to wages and working conditions until parties negotiate new agreement).

To extend nonstatutory labor exemption protection to unilateral changes in the terms of an expired collective bargaining agreement after impasse does not facilitate negotiation of a new collective bargaining agreement.

Such extension actually hinders such negotiation by forcing unions to accept terms concerning mandatory subjects of collective bargaining to which they never agreed simply because one party claimed impasse.[8]

Extending the nonstatutory labor exemption beyond expiration of the collective bargaining agreement burdens the negotiating process by forcing the parties to appeal to the NLRB or courts for resolution of such issues as whether the parties bargained in good faith after expiration and whether the parties in fact reached impasse. The adjudicating body must also determine whether this impasse may be broken by the parties' use of economic force, thereby making intervention premature. Given that the Supreme Court has characterized impasse as a recurring feature in negotiations, the suitability of extending the antitrust exemption to or beyond impasse becomes problematic. Such extension certainly encourages employers to feign or force impasse so as to justify unilateral imposition of restraints which may once have been but

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[8] While such extension can be justified by virtue of the fact that the union assented to the restraint at one point (when it executed the collective bargaining agreement), this assent, one might argue, can justifiably be regarded as continuing so long as there is no post-expiration objection to the restraint. This court believes that a better rule of law requires the parties to expressly agree to extend the terms in the collective bargaining agreement after expiration in order for the nonstatutory labor exemption to continue to shield the restraints from antitrust liability. Such a rule would obviate the fiction of assumed continued assent until impasse and would remove the issue of the applicability of the nonstatutory labor exemption from the indefinite twilight zone it is now in. Courts should not hold unions and employers to indefinite fictional contracts by treating the parties as if a collective bargaining agreement exists when in fact none exists. Furthermore, there is little incentive for the parties to execute a new collective bargaining agreement when the parties know that courts will continue indefinitely to honor the terms of an expired collective bargaining agreement without the parties even having to expressly agree to extend application of the terms in that agreement.

are no longer acceptable to the union. In addition, given that the definition of impasse acknowledges that it is a "recurring feature in the bargaining process" which is eventually broken in "almost all cases" by the application of economic force, *Bonanno Linen Service v. NLRB*, 454 U.S. at 412, permitting implementation of pre-impasse proposals which are then protected from antitrust liability by the nonstatutory labor exemption appears premature because it enables employers to obtain their objectives without having to make any compromises or resort to the economic forces which are part of the collective bargaining process.

Assuming only for purposes of this part of the court's opinion that the nonstatutory labor exemption extends beyond expiration of a collective bargaining agreement this court holds that the nonstatutory labor exemption ends at impasse because the fact that the parties have reached impasse shows that they no longer agree on terms involving mandatory subjects of collective bargaining. At impasse, at the latest, the policies behind providing the nonstatutory labor exemption are no longer furthered by continued application of that exemption. If the purpose of providing the nonstatutory labor exemption is to promote reaching new collective bargaining agreements by shielding restraints imposed within the context of collective bargaining agreements, it is inconsistent with that purpose to extend that exemption to restraints to which the union no longer agrees, even if the union had at one time agreed to the restraint and it was in a collective bargaining agreement. It seems that the only justification for such an extension would be that the restraint resulted from the fact that there was a collective bargaining *relationship* and that the parties had negotiated to some extent. Such an extension would actually discourage collective bargaining agreements because it would encourage employers to reach impasse since they could then implement restraints which the union found unacceptable without having to make any bargaining concessions. Employ-

ers would then be immune from antitrust liability for those restraints. This court does not believe that such an extension was contemplated in the national labor policy.

Allowing unilateral imposition of restraints at impasse would also short circuit the collective bargaining process as established by statute. As a means of overcoming impasse, unions and employers have various economic forces at their disposal. For example, various statutes exempt certain union activities, such as strikes, pickets, and boycotts, from the antitrust laws. *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100,* 421 U.S. at 621-22. The NFL has its own economic forces, such as lockouts and hiring replacement players if the players strike. *See Charles D. Bonanno Linen Service Inc. v. NLRB,* 454 U.S. at 415-16 n.9 (discussing economic forces of employers). In addition, both the NFL and NFLPA have the right to withhold consent or concessions on other bargaining provisions in order to force compromise or capitulation on a given issue during bargaining. In the context of this case, immunity from the antitrust laws for implementation at impasse of provisions which were not part of the expired collective bargaining agreement frustrates the normal operation of the collective bargaining process and gives employers an unfair advantage over unions by enabling employers to implement, without risk of antitrust liability, restraints to which the union has never agreed or no longer agrees. If permitted to implement pre-impasse proposals without risk of antitrust liability in order to obtain their objectives without having to make any concessions which would lead to the execution of a collective bargaining agreement, employers would have no incentive to negotiate collective bargaining agreements. Similarly, such extension would discourage unions from entering collective bargaining agreements because they would not want to be held indeterminately to restraints which they may only be willing to accept for a set amount of time as set forth in the agreement. Moreover, extending the exemption

beyond impasse deprives labor of one of its rightful bargaining forces: the threat of antitrust sanctions. For these reasons, this court will not extend the antitrust shield of the nonstatutory labor exemption beyond impasse.[9]

D. *Nonstatutory Labor Exemption Does Not Apply.*

As an additional alternative holding, this court finds that the nonstatutory labor exemption does not shield the NFL from antitrust liability for the salary provisions implemented here because those salary provisions were never encompassed in the expired collective bargaining agreement. Because the developmental squad was novel, and because the NFL implemented new salary provisions which were not part of the expired collective bargaining agreement, the nonstatutory labor exemption does not shield the NFL's implementation of the developmental squad salary provisions from antitrust liability. The case law cited above establishes that the nonstatutory labor exemption protects employers from antitrust liability for restraints contained in a collective bargaining agreement. This court does not read the nonstatutory labor exemption to extend antitrust protection to restraints that are not part of an existing, much less expired, collective bargaining agreement.

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[9] This court's finding that the nonstatutory labor exemption does not extend beyond impasse is consistent with Supreme Court precedent. The Supreme Court and this Circuit have acknowledged that employers do not violate the labor laws by unilaterally changing employment terms after impasse as long as these changes have been offered as good faith proposals in bargaining. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. at 483-84 n.5; *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. at 415-16 n.9; *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d at 1113; *NLRB v. Cauthorne*, 691 F.2d at 1025 (same); *but see Powell v. NFL*, 888 F.2d at 568 (nonstatutory labor exemption extends beyond impasse). However, those rulings do not stand for the proposition that such unilateral changes or restraints are exempt from the antitrust laws.

Courts cannot compel a party to accept contract terms to which that party has never agreed. In the labor field, the Supreme Court has found that, while the NLRB has the power to require employers and unions to negotiate, it does *not* have the power to compel either to agree to any substantive contractual provision of a collective bargaining agreement. *H.K. Porter Co. v. NLRB*, 397 U.S. at 103-104 & 109. The provision of the NLRA which relates to the obligation to bargain collectively expressly states that this obligation "does not compel either party to agree to a proposal or require the making of a concession . . . ." *Id.* at 106, citing 29 U.S.C. § 158(d) (1973 & Supp. 1991). Given that the Supreme Court has acknowledged that the law does not permit the NLRB to force a party to agree to a substantive contract provision, this court finds no rationale which would justify this court's imposing the developmental squad salary terms on the NFLPA because the NFLPA never agreed to that provision in the 1982 Collective Bargaining Agreement. Indeed, at the time that agreement was executed, the developmental squad concept had never been raised by either party.

While they do relate to wages, a mandatory subject of collective bargaining, the developmental squad salary provisions were never part of a collective bargaining agreement to which the NFLPA agreed. *See* Defendants' Motion for Summary Judgment, Statement of Material Facts Not in Genuine Dispute at ¶ 7 (defendants admit that "1982 bargaining agreement contained no provisions with respect to developmental squads . . . ."). The law regarding the nonstatutory labor exemption applies that exemption only to changes in terms relating to mandatory subjects of collective bargaining in a collective bargaining agreement. *See Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. at 544 n.6 ("any unilateral change by the employer in the pension fund *arrangements provided by an expired agreement* is an unfair labor practice") (emphasis

added); *Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965) ("[e]mployers and unions are required to bargain about wages, hours, and working conditions, and this fact weighs heavily in favor of antitrust exemption for *agreement* on these subjects") (emphasis added); *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d at 1113 ("provisions of [an] expired collective-bargaining *agreement* that relate to mandatory subjects are said to survive the agreement's expiration") (emphasis added); *NLRB v. Cauthorne*, 691 F.2d at 1025 (addressing employer's pre-impasse "unilateral change in *established* wages or working conditions") (emphasis added); *Mackey v. National Football League*, 543 F.2d at 612-13 (nonstatutory labor exemption applied to "Rozelle Rule" because it was encompassed by *prior collective bargaining agreements*) (emphasis added); *see* Lock, *The Scope of the Labor Exemption*, 1989 Duke L.J. at 352 n.85 ("union approval seems to be a prerequisite to the application of the exemption").

The present case does not involve any change in preexisting wage terms of either an active or expired collective bargaining agreement. In fact, creation of the developmental squads added a novel category of players to each NFL club. These players were not treated under the salary terms applicable to regular NFL players. Under the 1982 Collective Bargaining Agreement, the NFL players were expressly given the right to negotiate the salary terms of their contracts. 1982 Collective Bargaining Agreement at Article XXII, Plaintiffs' Exhibits at 1. By contrast, the developmental squad contracts indicates that the prospective developmental squad players had no right to negotiate their own salary terms but instead were to receive a fixed non-negotiable salary of $1,000 per week. Plaintiffs' Exhibits at 8, 9, 15 & 28. Moreover, the salary provision applicable to regular NFL players, as established in the expired collective bargain-

ing agreement, were not effected in any manner by implementation of the developmental squad salary provisions.[10]

Because the developmental squad salary provisions were a new concept and not a change in terms of the expired collective bargaining agreement, the policy behind continuing the nonstatutory labor exemption for the terms of a collective bargaining agreement after expiration (to foster an atmosphere conducive to the negotiation of a new collective bargaining agreement) does not apply. To hold that the nonstatutory labor exemption extends to shield the NFL from antitrust liability for imposing restraints never before agreed to by the union would not only infringe on the union's freedom to contract, *H.K. Porter Co. v. NLRB*, 397 U.S. at 108 (one of fundamental policies of NLRA is freedom of contract),[11] but would also contradict the very purpose of the antitrust exemption by not promoting execution of a collective bargaining agreement with terms mutually acceptable to employer and labor union alike. Labor

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[10] The fact that the principal issue in this case involves salary provisions, a mandatory subject of collective bargaining, does not trigger protection of the nonstatutory labor exemption simply by virtue of the fact that the expired collective bargaining agreement had salary provisions. That common thread is not enough. As discussed above, the developmental squad salary provision involved a wholly new concept involving the creation of a new category of football player which was never negotiated by the NFL and NFLPA and had never been included in the expired collective bargaining agreement. The NFL acknowledged as much when it proposed a modification of the expired 1982 Collective Bargaining Agreement, not to change the salary provision but to make it inapplicable to developmental squad players who would be covered by a "special services contract" of $1,000 per week. Plaintiffs' Exhibits at 9.

[11] The Supreme Court also noted that allowing an adjudicator to "compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the [NLRA] is based—private bargaining under governmental supervision of procedure alone, without any official compulsion over the actual terms of the contract." *H.K. Porter Co. v. NLRB*, 397 U.S. at 108.

unions would be unlikely to sign collective bargaining agreements with employers if they believed that they would be forced to accept terms to which they never agreed.

Finding that the salary restraint at issue in this case was never included in a collective bargaining agreement, this court holds that the nonstatutory labor exemption does not shield the NFL's action from antitrust liability. *See Mackey v. NFL*, 543 F.2d 606, 615-16 (8th Cir. 1976) (restraint at issue does not qualify for exemption from antitrust laws because restraint had never been bargained for with NFLPA and because NFL unilaterally incorporated restraint into collective bargaining agreements).

IV. CONCLUSION

For the reasons stated in this opinion, defendants' motion for summary judgment will be denied. Partial summary judgment will be granted for plaintiffs as to defendants' nonstatutory labor exemption defense. Defendants will not be permitted to raise the nonstatutory labor exemption as a defense to plaintiffs' antitrust claims in this case.

A separate order shall issue consistent with this opinion.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

DATE: Jun. 4, 1991

[Filed June 4, 1991]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-1071
(RCL)

ANTONY BROWN, *et al.*,
Plaintiffs,

v.

PRO FOOTBALL, INC., d/b/a
WASHINGTON REDSKINS, *et al.*,
Defendants.

ORDER

(Striking Nonstatutory Labor Exemption Defense)

This case comes before the court on plaintiffs' motion to strike defendants' nonstatutory labor exemption defense or for partial summary judgment, defendants' motion for summary judgment as to the nonstatutory labor exemption, and the parties' respective oppositions and replies. After consideration of all the arguments and authorities presented by both parties in their filings and at oral argument, and for the reasons stated in the accompanying Memorandum Opinion issued this date, it is hereby

ORDERED that:

1. Defendants' motion for summary judgment on the nonstatutory labor exemption defense is DENIED.

2. Plaintiffs' motion for partial summary judgment on the nonstatutory labor exemption defense is GRANTED and defendants' nonstatutory labor exemption defense is STRICKEN.

3. Defendants shall file an opposition to plaintiffs' Motion for Summary Judgment on Liability (filed December 17, 1990), by July 5, 1991.

4. Plaintiffs shall file a reply to defendants' opposition by July 15, 1991.

SO ORDERED.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

DATE: Jun. 4, 1991

APPENDIX D

[Filed Mar. 10, 1992]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-1071
(RCL)

ANTONY BROWN, *et al.*,
Plaintiffs

v.

PRO FOOTBALL, INC., d/b/a
WASHINGTON REDSKINS, *et al.*,
Defendants.

MEMORANDUM OPINION

This case comes before the court on Plaintiffs' Motion for Summary Judgment On Liability,[1] the NFL Defendants' Brief In Opposition To Plaintiffs' Motion For Summary Judgment On Liability ("NFL's Opposition"), and plaintiffs' Reply Memorandum In Support Of Plaintiffs' Motion For Summary Judgment On Liability ("Plaintiffs' Reply"). Upon consideration of the oral arguments of counsel, the authorities presented in their memoranda, and the record herein, the court will grant plaintiffs' motion for summary judgment on liability.

I. *FACTS*

Plaintiffs in this action are professional football players who played on Developmental Squads of the twenty-eight

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[1] Plaintiffs submitted a Memorandum In Support of Plaintiffs' Motion For Summary Judgment On Liability ("Plaintiffs' Memorandum"), as well as two volumes which contain statements of material facts and exhibits: Plaintiffs' Statement Of Material Facts Not In Genuine Dispute And Supporting Exhibits; and Plaintiffs' Supplemental Statement Of Material Facts Not In Genuine Dispute And Supplemental Exhibits, Volume II. When necessary to refer to either volume, the court will cite to "Plaintiffs' Exhibits, Volume I," or to "Plaintiffs' Exhibits, Volume II."

National Football League ("NFL") teams during the 1989 regular and post-seasons. By court order, plaintiffs have been certified as a class for purposes of the present case.[2] Defendants are the individual twenty-eight clubs which comprise the NFL, as well as the NFL itself.

On February 23, 1989, the NFL's Long Range Planning/Finance Committee discussed the framework for establishing Developmental Squads of up to six players for each of the NFL teams. Plaintiffs' Exhibits, Volume I, at 4. The Developmental Squads were a new concept which, under the terms of 1989 Resolution G-2 ("Resolution G-2"), would permit each NFL club to sign rookie and first year free agents to services contracts for the 1989 NFL season.[3] At its annual meeting on March 22, 1989, the NFL, *inter alia*, voted to adopt Resolution G-2 and to amend the NFL Constitution and Bylaws accordingly. Under the terms of Resolution G-2, the NFL clubs would be able to sign Developmental Squad players beginning on September 5, 1989. *Id.* at Exhibit 5.

The present case and the motion currently before the court involve the compensation terms of Resolution G-2, which provided that Developmental Squad players would be paid a fixed salary of $1,000 per week, instead of being permitted to negotiate their own salaries. On September 5, 1989, the day the NFL clubs began signing developmental players, then-NFL Commissioner Pete Rozelle circulated a memorandum to all NFL teams remind-

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[2] Named plaintiffs include Antony Brown, James Bishop, John Buddenberg, Gary Couch, Craig Davis, Matthew J. Jaworski, Ricky Andrews, and Wesley Pritchert.

[3] Resolution G-2 defined the two classes of players as follows:

> A "Rookie" is defined as a player who has not previously been under contract to a professional football team. Players who have been active in another professional football league or whose NFL experience is limited to training camp or fewer than three games on an Active List during the regular season or postseason are "first-year players."

Plaintiffs' Exhibits, Volme I, at Exhibit 5.

ing them that "weekly compensation to be paid to Developmental Squad Players is $1,000. Individually negotiated terms above or below $1,000 are not permitted." *Id.* at Exhibit 28. The memorandum indicated that other forms of compensation, such as per diem or housing arrangements, were impermissible. *Id.* On October 17, 1989, Eugene Upshaw, representative of the NFL Players Association ("NFLPA"), sent Jack M. Donlan, Executive Director of the NFL Management Council, a letter stating the NFLPA view that the Developmental Squad salary provision "violates the law." *Id.* at Exhibit 35. Plaintiffs, through the NFLPA, filed the present suit on May 9, 1990.

During each week of the 1988 and 1989 regular and post-seasons, each NFL club was permitted to carry on its roster a maximum of forty-five active and two inactive players. Plaintiffs' Exhibits, Volume II, at 2, ¶ 37.[4] Each club, carried the maximum number of forty-seven players on their Active/Inactive lists during virtually every week of both seasons. *Id.* Only players on the active list were permitted to suit up and play during each week. *Id.* ¶ 38. Inactive players were permitted to practice with their clubs. *Id.* ¶ 39. During the 1988 and 1989 regular and post-seasons, the NFL Constitution and Bylaws provided that "[p]layers on Reserve/Injured are compensated at the full rate of their NFL Players Contracts . . . ." *Id.* ¶ 40.

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[4] The facts set forth from this point on in Part I of this Memorandum Opinion are taken from Plaintiffs' Supplemental Statement Of Material Facts Not In Genuine Dispute, located in Plaintiffs' Exhibits Volume II, and Defendants' Response To Plaintiffs' Supplemental Statement Of Material Facts Not In Genuine Dispute. Both plaintiffs' and defendants' supplemental statements include citations to supporting documents. Since defendants did not file a Statement of Genuine Issues, as required by Local Rule 108(h), plaintiffs properly pointed out at oral argument that the court could, and it hereby does, accept as true all of plaintiffs' Statements of Material Facts. *See Twist v. Meese*, 854 F.2d 1421 (D.C. Cir. 1988).

In 1988, the NFL Constitution and Bylaws contained the following language concerning reserve/injured players participating in practices and other team functions:

> PARTICIPATION WHILE ON RESERVE/INJURED. Players on Reserve/Injured may attend team meetings and participate in practice sessions with Active List players as soon as physically able to do so. Players on Reserve/Injured are prohibited from appearing in games, participating in game-day warm-ups with their teams, dressing in game uniforms on game-days, or representing their teams in pre-game ceremonies. Reserve/Injured players may, however, serve their clubs on the sidelines, provided they perform a necessary function connected with the game, dress in clothing issued by the club to its game staff, and display appropriate credentials under the prevailing rules covering the bench areas.
>
> . . .
>
> 4. Throughout the entire four-week period specified in Nos. 2 and 3 above [concerning players with major pre-season injuries], the involved player must not engage in regular practice. He will be limited to rehabilitation workouts apart from Active List players. The club would be required to notify the League office by TWX as soon as the player resumes regular practice, in which case the four-week "clock" would stop, and the club would have no right to place the player onto Reserve/Injured with a major injury. Of course, if a subsequent injury occurred, the procedures could be repeated.
>
> 5. Despite the prohibition of practice during the four-week period under No. 4 above, if, in the preseason or regular season, a player goes onto Reserve/Injured under normal circumstances and his injury is documented as four weeks or more from the date of going onto Reserve, then such player may resume practice sessions with Ac-

> tive List players as soon as physically able to do so; provided, however, that the Commissioner may, if he deems the content and date of the resumed practice to be inconsistent with the purported nature and severity of the player's injury, take such factors into account in his investigation of the case.

Id. at 2-3, ¶ 41.

The following members of the plaintiff class were on reserve/injured status during the *1988* NFL season and were paid by their respective clubs the weekly salaries set forth below: [5]

Class Members' Name	1988 Club	1988 Weekly Salary
a. Birden, J.J.	Clev. Browns	($3,750)
b. Brown, Henry	Buffalo Bills	($4,250)
c. Brown, Tony	N.Y. Giants	($4,688)
d. Carter, Jon	N.Y. Giants	($4,688)
e. Crudup, Derrick	L.A. Raiders	($4,375)
f. Cullity, Dave	Clev. Browns	($5,312)
g. Derby, Glenn	N.O. Saints	($2,500)
h. Ford, Bernard	Buffalo Bills	($6,250)
i. Henley, Thomas	L.A. Rams	($2,812)
j. Henry, Charles	L.A. Raiders	($2,500)
k. Murray, Dan	Buffalo Bills	($3,125)
l. Patchan, Matt	Phil. Eagles	($6,875)
m. Roach, Kirk	Buffalo Bills	($3,125)
n. Sterling, Rod	Phil. Eagles	($4,187)
o. Stewart, Curtis	Chicago Bears	($2,187)
p. Usher, Daryl	N.E. Patriots	($2,812)
q. VanDruten, R.	K.C. Chiefs	($2,812)
r. Ware, Reggie	L.A. Raiders	($2,375)
s. Whitaker, D.	N.Y. Giants	($4,250)
t. Williams, R.	S.D. Chargers	($2,187)

Id. at 4, ¶ 43.

[5] Defendants do not dispute this paragraph, except for the alleged "inaccurate juxtaposition of player names and team names." Defendants' Response To Plaintiffs' Supplemental Statement Of Material Facts Not In Genuine Dispute at ¶ 43. Because neither party corrected any alleged "inaccurate juxtaposition" and because defendants do not dispute the paragraph, the court has reproduced it as presented by plaintiffs.

In recommending adoption of Resolution G-2, the NFL's Combined Finance/Long Range Planning Committee acknowledged a "fiscal" reason: "[t]o promote competitive equality under fiscally responsible circumstances while maintaining many elements of the personnel system currently in place." *Id.* at ¶ 44. As adopted as an amendment to the NFL Constitution, Resolution G-2 provided that certain players placed on reserve/injured status could not practice and that others could, but would count against each Club's limit of six Developmental Squad players:

a. A player placed on Reserve/Injured prior to or concurrent with the final roster reduction may not return to his club's Active List in that season under any circumstances. Clubs may request waivers on such players at any time or retain them on their Reserve/Injured List for the rest of the season. Such players may not practice.

b. Players placed on Reserve/Injured after the final roster reduction will be eligible to return to the club's Active List after a minimum of six games, either by free activation or by procedural recall waivers. Clubs will be permitted five free activations during the regular season.

   For such players, clubs will have two options: option one is to begin practice after a minimum of four weeks, and option two is to begin practice after a minimum of six weeks on Reserve/Injured.

   Option One: If a player begins practice after a minimum of four weeks, the club is permitted to practice the player for a maximum of two weeks, after which it must either return him to the Active List or request waivers, unless he has been injured; if injured, the player may be retained on Reserve/Injured, but he will not be eligible to practice or to be activated thereafter.

> *Option Two* If a player begins practice after a minimum of six weeks on Reserve/Injured, the player is eligible to practice for the rest of the season, but he counts against the club's Developmental Squal limit of six players.

Id. at 4-5, ¶ 45.

The NFL's internal analysis showed that sixty-seven drafted players in 1989 had signed Developmental Squad contracts, a number precisely equal to the number of drafted players in 1988 who had been placed on reserve/injured status as of the first regular season game of each season. *Id.* at 6-7, ¶ 47. A question and answer sheet prepared by the NFL confirmed that reserve/injured players cleared to practice would be counted against the maximum number of six Developmental Squad players that each club could carry. *Id.* at 7, ¶ 49. During the 1989 season, the NFL issued a Player-Personnel directive to all NFL clubs concerning the game day activities of Developmental Squad players and other players not on a club's Active List. This document directed that all such players be treated similarly:

> Clubs are reminded that, according to League policy, players on Reserve/Injured, the Inactive List, and the Developmental Squad are prohibited from participating in game-day warmups with their teams, dressing in game uniforms on game-days, or representing their teams in pregame ceremonies. They may, however, serve their clubs on the sidelines *provided they perform a necessary function connected with the game, dress in clothing issued by the Club to its game staff, and display appropriate bench area credentials.*

Id. at 8, ¶ 51.

A number of the members in plaintiffs' class obtained employment as NFL players of one sort or another in

1990. As of October 1, 1990, the date of the computer generated "Player Profiles" produced in discovery, fifty-four members were listed by the NFL as Active, and twenty-six were listed on Reserve/Injured or Reserve/Physically Unable to Performs. Other class members had been signed to 1990 Practice Player Contracts.[6] *Id.* at 9, ¶ 55.

II *LAW*

Plaintiffs claim that the uniform wage provision in Resolution G-2 violates the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1 (1973 & Supp. 1991), and move for summary judgment on the NFL's and the NFL clubs' liability for the antitrust violation. The relevant section of the Sherman Act provides: "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." 15 U.S.C. § 1 (1973 & Supp. 1991). Plaintiffs also claim that defendants' unlawful salary restraint caused injury to their business or property for which they are entitled to treble damages and attorney's fees under section 4 of the Clayton Act.[7] Rule 56(c) of the Federal Rules of Civil Procedure establishes that summary judgment is appropriate when an examination of the record as a whole reveals "no genuine issue as to any material fact and that the moving party is entitled to judgment as

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[6] For the 1990 regular and post-seasons, the NFL replaced the Developmental Squads with Practice Squads. The parties to this action, through counsel, negotiated an agreement concerning the practice squads called the "Partial Settlement Agreement For 1990." A similar agreement was negotiated for the 1991 season and approved by the court on September 13, 1991.

[7] Section four provides, in relevant part:

> . . . any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a) (1973 & Supp. 1991).

a matter of law." In examining the record, the court must view all inferences in the light most favorable to the non-moving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).[8]

III. *ANALYSIS*

Plaintiffs' motion requires the court to consider (1) whether the legality of the salary provision in Resolution G-2 is governed by the *per se* rule or the rule of reason; and (2) whether, under the applicable analysis, the undisputed facts establish that the Resolution G-2 salary provision is an antitrust violation.

A. *Applicability of Antitrust Laws to Salary Restraint*

Defendants claim that the antitrust laws have no application to alleged restraints, such as the one in this case, which affect only the labor market. NFL's Opposition at 54 n.42. Defendants' argument boils down to an assertion that the antitrust laws do not apply to wage-fixing restraints imposed by employer groups on employees. To support this claim, defendants cite the first sentence of

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[8] Defendants' suggestion that the summary judgment standard in this case is "unusually demanding" because plaintiffs would carry the burden of proof on their claims at trial, NFL's Opposition at 21-22, is misleading. In support of their position, defendants cite a provision in *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986), which states: "where the moving party has the burden . . . his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." This provision merely restates the standard established by the Supreme Court. The Supreme Court established the trial court's function on a motion for summary judgment as follows: "at the summary judgment stage, the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Defendants have failed to establish that the summary judgment standard in *Calderone* is any different than the standard articulated by the Supreme Court.

Section 6 of the Clayton Act, which states: "[t]he labor of a human being is not a commodity or article of commerce." Clayton Act § 6, 15 U.S.C. § 17 (1982). By selectively reading only the first sentence, defendants misapprehend Section 6 of the Clayton Act. In full, Section 6 of the Clayton Act states:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Contrary to defendants' assertion, wage-fixing restraints which affect the labor market are considered price-fixing restraints subject to the antitrust laws. Section 6 of the Clayton Act does not exempt such restraints from antitrust liability:

> It is readily apparent that Congress, in enacting § 6, was concerned with the right of labor and similar organizations to continue engaging in [activities which otherwise would be considered antitrust violations], including the right to strike, not with the right of employers to band together for joint action in fixing the wages to be paid by each employer. There is no evidence of the existence of any necessity to protect the latter type of activity at the time when § 6 was enacted. It seems clear that if Congress had wanted to exempt agreements between employers as to the money or compensation that would be paid to their employees, it would not have limited § 6 to exemption of "[t]he labor of a human being" which can be

> restrained only by the employees or unions controlling the labor itself. Congress would also have provided that compensation offered or paid by employers to employees is not a commodity or article of commerce. This it did not do.

Cordova v. Bache & Co., 321 F. Supp. 600, 606 (S.D.N.Y. 1970) (Judge Mansfield). The principle that wage-fixing restraints are price-fixing restraints cognizable under the Sherman Act has been accepted by several courts. *See Mackey v. National Football League*, 543 F.2d 606, 617 n.22 (8th Cir. 1976) (quoting Judge Mansfield's *Cordova* passage in full); *International Ass'n of Heat and Frost Insulators v. United Contractors Assoc.*, 483 F.2d 384, 393 (3d Cir. 1973) (citing *Cordova* for proposition that § 6 of Clayton Act prohibits employers from banding together to fix wages); *Jacobi v. Bache & Co.*, 377 F. Supp. 86, 95 (S.D.N.Y. 1974) (agreeing in principle that wage-fixing is price-fixing). Moreover, the Supreme Court has noted that price fixing by purchasers of goods "is the sort of combination condemned by the [Sherman] Act." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948). The court finds no discernible reason, given that the Sherman Act applies to services as well as goods, *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 490 (1950) (Sherman Act "aimed at combinations organized and directed to control of the market by suppression of competition 'in the marketing of goods and services' ") (citation omitted), why wage-fixing by purchasers of services should be treated differently than price-fixing by sellers of goods.

Other precedent lends further support to the application of the Sherman Act to wage-fixing restraints. The Supreme Court has noted the "broad remedial and deterrent objectives" of the Clayton Act and has recognized that the statute "does not confine its protection to consumers, or to purchasers, or to sellers . . . . The Act is

comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982) (quotation marks and citation omitted). The Supreme Court has clearly stated that the exchange of a "service for money is 'commerce' in the most common usage of that word" and that the Sherman Act applies to restraints involving the sale of services. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787-88 (1975).

Furthermore, the Supreme Court has noted that a consumer is injured in his or her business or property when the price of "goods or services is artificially inflated by reason of the anticompetitive conduct complained of." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). By analogy, and applying the broad remedial and deterrent objectives of the Clayton Act, a service provider is injured in his business or property when buyers of those services artificially deflate the price of services through cooperative anticompetitive conduct. *See Chattanooga Foundry & Pipe Workers v. Atlanta*, 203 U.S. 390, 396 (1960) (recognizing that a city can be injured in its "business of furnishing water" by an antitrust violation). The law in the District of Columbia Circuit recognizes "that athletes have standing to challenge player restrictions in professional sports since the restraints operate directly on, and to the detriment of, the employee." *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1175 n.2 (D.C. Cir. 1978).[9] Based on the authority cited above, this court finds that wage-fixing is an antitrust violation to which the Sherman Act applies.

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[9] Defendants do not contest that the alleged restraint affects interstate commerce.

B. *Sherman Act Liability*

1. *Per Se* Rule

Plaintiffs claim that defendants' agreement in Resolution G-2 to pay all Developmental Squad players a flat sum of $1,000 per week, regardless of any individual player's background, skill, or potential, is a *per se* violation of the Sherman Act. Plaintiffs' Memorandum at 17. Plaintiffs insist that the *per se* rule, rather than the rule of reason, applies because the challenged price-fixing restraint "is so thoroughly without redeeming virtue and had such an immediate and direct impact on competition for the services of these players, that it must be conclusively presumed to be unreasonable without any elaborate inquiry into the business excuse for its use." *Id.* at 18. Defendants counter that the *per se* rule does not apply to agreements among participants in joint enterprises in which the participants are not independent competitors. Defendants also claim that because the NFL teams are part of a joint venture, the court must undertake a rule of reason analysis and that genuine issues of material fact exist which preclude entry of summary judgment. NFL's Opposition at 23 & 40.[10] The court will address each argument in turn.

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[10] Defendants also claim that the *per se* rule does not apply because the price-fixing restraint was ancillary to the otherwise lawful G-2 Resolution. The court disagrees. While there may have been several purposes to the G-2 Resolution, the fixed salary provision was certainly central to that agreement. *See* Plaintiffs' Exhibits, Vol. II at ¶ 44 (reason to adopt Resolution G-2 was "[t]o promote competitive equality under fiscally responsible circumstances"). In fact, defendants acknowledge that without the fixed salary provision, Resolution G-2 would not have been adopted by the clubs. *See* NFL's Opposition at 44 (citing Declaration of Joel Bussert, Director of Player Personnel for NFL) ("but for the uniform salary there would have been no Developmental Squad program at all"). Given defendants' own admissions, the court rejects defendants' claim that the salary restraint was ancillary.

The Sherman Act prohibits combinations formed for the purpose of "raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce . . . ." *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 346 (1982) (citing *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 213 (1951)). The Supreme Court explained:

> [a] conclusion that a restraint of trade is unreasonable may be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.

National Collegiate Athletic Association v. Board of Regents of University of Oklahoma, 468 U.S. 85, 103 (1984) ("*NCAA*") (quoting *National Society of Professional Engineers v. United States*, 435 U.S. 679, 690 (1978)). The Supreme Court has held that agreements to fix prices are unlawful *per se*, without regard to whether the prices fixed are reasonable. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980). Supporting its view that price fixing agreements are unlawful *per se*, the Court noted that the "anti-competitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that [the Supreme Court] adhere[s] to the rule of law that is justified in its general application." *Maricopa County Medical Society*, *supra*, 457 U.S. at 351. The Court explained:

> *Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. But whether the

> ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition.

NCAA, *supra*, 468 U.S. at 103-104.

The court has acknowledged that, as "generally used in the antitrust field, 'price fixing' is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable," *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.*, 441 U.S. 1, 9 (1979), but that literal application of the *per se* rule can be "overly simplistic and often overbroad." *Id.* Therefore, in order to determine whether challenged conduct is a *per se* violation of the Sherman Act, a court must determine whether the challenged conduct falls "within or without that category of behavior to which [the Supreme Court] applies the label '*per se* price fixing.'" *Id.* On its face, the salary restraint in Resolution G-2 fixes a uniform wage to be paid all Developmental Squad players, and so appears to be a *per se* price-fixing restraint.

Because price-fixing agreements are sometimes lawful when promulgated by parties to a joint venture, analysis of Resolution G-2 under the *per se* rule becomes problematic. The Supreme Court has stated that "[j]oint ventures and other cooperative arrangements are . . . not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." *Id.* at 23. The Supreme Court, however, cautioned: "joint ventures have no immunity from the antitrust laws . . . ." *NCAA*, *supra*, 468 U.S. at 113 (internal punctuation marks and citation omitted).[11]

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[11] The *NCAA* case bears factual and legal parallels to the present case. In *NCAA*, two universities sued the NCAA for adopting a plan which limited the amount of televised intercollegiate football games and the number of games which any member college could televise. No NCAA member could sell the rights to televise

Defendants' assertion that the NFL is a joint venture is not disputed. This Circuit has noted that the NFL is a joint venture in which the individual clubs are not competitors in an economic sense:

> The clubs operate basically as a joint venture in producing an entertainment product—football games and telecasts. No NFL club can produce that product without agreements and joint actions with every other team. . . . These economic joint venturers "compete" on the playing field, to be sure, but here as well, cooperation is essential if the entertainment product is to achieve a high quality: only if the teams are "competitively balanced" will spectator interest be maintained at a high pitch.

Smith v. Pro Football, Inc., 593 F.2d 1173, 1179 (D.C. Cir. 1978); *see NCAA*, *supra*, 468 U.S. at 102 (applying joint venture analysis). After so describing the NFL as a joint venture, the D.C. Circuit found that the alleged group boycott restraint—the NFL's college draft system—was "designed not to insulate the NFL from

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live coverage of its football games except according to the provisions of the plan. The NCAA had separate agreements with two television networks: CBS and ABC. The two universities were members of the NCAA and of the College Football Association ("CFA"), which had been formed to promote the interests of major football colleges within the NCAA. CFA negotiated a contract with NBC which would have allowed more televised games for each college, and would have increased the revenues of CFA members. In response, the NCAA threatened to take disciplinary action against any CFA member which failed to comply with the NCAA plan. The Supreme Court, while acknowledging that the NCAA plan was a horizontal restraint which would normally be presumed unreasonable, decided that it "would be inappropriate to apply the *per se* rule . . . ." *Id.* at 100. Critical to the Court's decision was the fact that the NCAA case involved "an industry in which horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 101. After applying the rule of reason analysis, the Supreme Court held that the NCAA plan was an unlawful antitrust restraint. *Id.* at 119-20.

competition, but to improve the entertainment product by enhancing the teams' competitive equality." *Smith*, 593 F.2d at 1179. The court concluded that the *per se* rule should not be applied because the draft restraints were "not designed to drive out competitors but to achieve some other goal." *Id.* at 1180.[12] The court continued: "[i]nvocation of a *per se* rule always risks sweeping reasonable, pro-competitive activity within a general condemnation, and a court will run this risk only when it can say, on the strength of unambiguous experience, that the challenged action is a naked restraint of trade with no purpose except stifling competition." *Id.* at 1181 (footnotes and quotation marks omitted). The court also noted the demanding standard for finding *per se* illegality: "[*p*]*er se* rules of illegality are appropriate only when they relate to conduct that is *manifestly anticompetitive*." *Id.* at 1181 (emphasis added by D.C. Circuit in *Smith*) (quoting *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1972)).

This court cannot find, based on the record before it, that the salary restraint in Resolution G-2 is manifestly anticompetitive or that it has *no* purpose except to stifle competition. The restraint's effect was limited to a small percentage of prospective NFL players and the court can not "describe its impact on the market for players' services as 'pernicious.'" *Smith*, 593 F.2d at 1181. Moreover,

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[12] The court noted that:

> courts have consistently refused to invoke the boycott *per se* rule where, given the peculiar characteristics of an industry, the need for cooperation among participants necessitated some type of concerted refusal to deal, or where the concerted activity manifested no purpose to exclude and in fact worked no exclusion of competitors. In view of the joint-venture characteristics of the professional football industry and the purpose of the concerted activity here, these decisions support our conclusion that the NFL player draft is not a group boycott which is illegal *per se*.

Id. at 1180-81 (footnotes omitted).

defendants have alleged that Resolution G-2, including the salary restraint, serves several procompetitive purposes, including enhancing competition in the labor market and thereby enhancing the quality of the NFL's entertainment product. Defendants have supported their procompetitive allegations in the exhibits submitted with their opposition. *E.g.* NFL's Opposition at Exhibits A & C. While defendants claim procompetitive purposes, plaintiffs deny such purposes. Both sides have submitted evidentiary support for their respective positions. Because defendants are part of a joint venture and have offered procompetitive purposes for the salary restraint, the court will analyze the restraint under the rule of reason.

2. Rule Of Reason

Under the rule of reason, the court must determine whether a restraint is "significantly anticompetitive in purpose or effect." *Smith,* 593 F.2d at 1183. This determination requires the court to analyze the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. *Id.* (citing *National Society of Professional Engineers v. United States,* 435 U.S. 679, 692 (1978)). If the analysis reveals that the restraint has legitimate business purposes which would promote competition, the court must then balance the "anticompetitive evils" of the challenged restraint against its "procompetitive virtues." *Id.* (citations omitted). If the anticompetitive evils outweigh the procompetitive virtues, the restraint substantially impedes competition and is therefore unreasonable. *Id.*[13]

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[13] The Supreme Court has noted that it is not necessary to establish a party's monopoly power or market power in order to establish the unreasonableness of a given restraint:

> While the 'reasonableness' of a particular alleged restraint often depends on the market power of the parties involved, because a judgment about market power is the means by which the effects of the conduct on the market place can be assessed,

Defendants cannot claim that the uniform salary provision was not significantly anticompetitive in its effect. The uniform salary provision prohibited clubs from paying Developmental Squad players anything but $1,000 per week. This prohibition necessarily eliminated all competition and prevented prospective Developmental Squad players from negotiating salary terms among interested NFL clubs. The salary restraint robbed each seller of football services of any bargaining power, left no room "for competition among the teams for the services of [rookie and first year] players, and utterly strip[ped] them of any measure of control over the marketing of their talents." *Id.* at 1185. While the impact of the restraint on any given plaintiff, whether positive or negative, is not presently before the court, the effect of the uniform salary provision was to "suppress or even destroy competition." *Id.* at 1186 (quotation marks and citation omitted).

Defendants have offered several allegedly procompetitive justifications for the salary restraint. Under precedent in this Circuit, however, and as will be discussed more fully below, the alleged procompetitive purposes are not relevant to the rule of reason analysis. In fact, the procompetitive purposes defendants claim in this case are similar to the ones which the D.C. Circuit rejected in *Smith* after performing the rule of reason analysis under analogous facts.

Several of defendants' procompetitive claims are plainly irrelevant insofar as they lack any correlation between the salary restraint itself and the asserted procompetitive purpose. For example, defendants claim that the additional

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> market power is only one test of 'reasonableness.' And where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary.

NCAA, 468 U.S. at 110-111 n.42 (quoting Brief for United States as *Amicus Curiae* 19-20).

"development and training opportunities" provided by the Developmental Squads "enhances competition in the labor market for professional football players." *Id.* While implementation of the Developmental Squad concept may further this goal, defendants fail to show how Resolution G-2's uniform salary provision is necessary or even relates to this alleged procompetitive justification. Similarly, defendants' claim that Resolution G-2 creates otherwise unavailable football employment opportunities, even if true, does not provide any procompetitive justification for the salary restraint. The same opportunities would be available if Resolution G-2 did not have a salary restraint. The fact that an employer creates jobs does not allow that employer to violate the Sherman Act by fixing salaries.

Defendants' primary procompetitive claim is that Resolution G-2 "promotes competitive balance in the league by eliminating (1) 'stashing' of quality players and (2) consequent disparities in the number of players available for practice purposes." *Id.* This procompetitive purpose allegedly "enhances the quality of the [NFL's] entertainment product and benefits 'consumers' of NFL football." *id.*[14] Defendants claim that "[b]y stashing quality players and consequently accumulating extra players for practice purposes, [some] teams secured an 'unfair' advantage that threatened to undermine the competitive balance crucial

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[14] While the court acknowledges some correlation between the "stashing" point and the salary restraint, the court does not see the correlation of the number of practice players each team has to the salary restraint itself. Because the basis for both the stashing and equalization objectives (promoting competitive balance among the NFL clubs), is irrelevant to the rule of reason inquiry, however, the court need not address the correlation or lack thereof. The court also notes that the rule of reason analysis "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. . . . [T]he inquiry instead must be confined to a consideration of the restraint's impact on competitive conditions." *Smith*, 593 F.2d at 1186 (quotation marks, brackets, and footnote citations omitted).

to producing the NFL's popular entertainment product." NFL's Opposition at 43-44. This Circuit has expressly found defendants' proffered "competitive balance" and "better product" purposes to be irrelevant to the rule of reason analysis. *Smith,* 593 F.2d at 1186.

Because the discussion in *Smith* directly addresses and disposes of the issues presently before this court, the discussion will be reproduced in its entirety below, replacing the draft restraint in *Smith* with the fixed salary restraint involved in the present case:

> The NFL has endeavored to summarize this justification by saying that the [fixed salary] ultimately has a "procompetitive" effect, yet this shorthand entails no small risk of confusion. The [fixed salary] is "procompetitive," if at all, in a very different sense from that in which it is anticompetitive. The [fixed salary] is anticompetitive in its effect on the market for players' services because it virtually eliminates economic competition among buyers for the services of sellers. The [fixed salary] is allegedly "procompetitive" in its effect on the playing field; but the NFL teams are not economic competitors on the playing field . . . . Because the [fixed salary's] "anticompetitive" and "procompetitive" effects are not comparable, it is impossible to "net them out" in the usual rule-of-reason balancing. The [fixed salary's] "anticompetitive evils," in other words, cannot be balanced against its "procompetitive virtues," and the [fixed salary restraint can] be upheld [only] if the latter outweigh the former. In strict economic terms, the [fixed salary's] demonstrated procompetitive effects are nil.

Smith, 593 F.2d at 1186 (citing *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978)).[15] The court finds that the NFL's alleged pro-

[15] Any claim that the fixed salary provision made the developmental squads themselves more competitive or comparable with

competitive purposes are either insufficient as a matter of law because they fail to justify the necessity of the salary restraint or they are not relevant to the rule of reason analysis.

Even after viewing all inferences in the light most favorable to the NFL, and basing this ruling only on undisputed material facts, the court finds that defendants have failed to establish any legitimate business purpose which would promote competition and thereby make the challenged salary restraint lawful under the rule of reason analysis. Accordingly, pursuant to a separate order issued this date, the court will grant plaintiffs' motion for summary judgment on liability.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

DATE: Mar. 10, 1992

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each other is likewise rejected. Because the developmental squads did not compete with each other directly, it is obvious that the purpose of any claimed competitive balance among the developmental squads was to promote greater competitive equality among the parent NFL clubs. Such a competitive equality argument, as discussed above, is irrelevant to the antitrust balancing analysis presently before the court.

[Filed Mar. 10, 1992]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-1071
(RCL)

ANTONY BROWN, *et al.*,
Plaintiffs,
v.

PRO FOOTBALL, INC., d/b/a WASHINGTON REDSKINS, *et al.*,
Defendants.

ORDER

This case comes before the court on Plaintiffs' Motion For Summary Judgment On Liability, the NFL Defendants' Brief In Opposition To Plaintiffs' Motion For Summary Judgment On Liability ("NFL's Opposition"), and plaintiffs' Reply Memorandum In Support Of Plaintiffs' Motion For Summary Judgment On Liability ("Plaintiffs' Reply"). Upon consideration of the oral arguments of counsel and the record herein, and pursuant to the reasoning set forth in the separate Memorandum Opinion issued this date, it is hereby

ORDERED that Plaintiffs' Motion For Summary Judgment On Liability is GRANTED. Summary judgment is hereby entered on behalf of the plaintiff class against the NFL and the 28 NFL club defendants. Defendants are liable to plaintiffs under the antitrust laws for fixing the salaries of Developmental Squad players in 1989.

Damages shall be determined in a trial to be scheduled.

SO ORDERED.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

DATE: Mar. 10, 1992

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 93-7165 et al.

ANTONY BROWN, *et al.*,
Appellees-Petitioners,

v.

PRO FOOTBALL, INC., *et al.*,
Appellants.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE UNITED STATES AS AMICUS CURAE IN SUPPORT OF PETITION FOR REHEARING [1]

INTEREST OF THE UNITED STATES

The United States has primary responsibility for enforcing the antitrust laws. The extent to which those laws are held inapplicable because of federal labor law is an issue

[1] Simultaneously with this Brief, the United States is filing a motion for leave to file it in support of appellants' suggestion for rehearing in banc.

in whose resolution the United States has an important interest. We file this brief because of our belief that the Court's decision resolves the issue in a manner that disserves both antitrust and labor policies, and that is likely to have significantly adverse effects that reach well beyond professional sports.

ISSUE PRESENTED

Whether the National Labor Relations Act requires employees to forego unionization in order to bring an antitrust suit against employers who, by agreement among themselves, fix the wages of the employees.

STATEMENT

1. *Background.*

This is an antitrust suit by professional football players who were placed on "developmental squads" of National Football League teams, and paid salaries agreed upon among the team owners. A collective bargaining agreement, which had no provision for developmental squads, expired in 1987. The teams subsequently created these squads, after union-management negotiations about compensation for squad members reached an impasse, the teams agreed among themselves to impose the salaries unilaterally. The players who were paid these salaries sued under the antitrust laws for treble damages and an injunction.

The defendants claimed that their agreement to impose uniform salaries was protected by the nonstatutory labor exemption from the antitrust laws. The district court (Lamberth, J.) struck that defense, ruling that their immunity under this exemption expired when the prior collective bargaining agreement expired, or when the parties reached impasse in their negotiations. *Brown* v. *Pro Football, Inc.*, 782 F. Supp. 125, 130-37 (D.D.C. 1991). Alternatively, it found no immunity because the provision

had never been included in a contract. *Id.* at 137-39. Ultimately, after a jury trial, the district court awarded damages which, when trebled, totalled over $30 million and also permanently enjoined the defendants from setting regular season salaries for any category of players. *Brown* v. *Pro Football, Inc.*, 1993 Trade Case (CCH) ¶ 70,260 (D.D.C.).

2. *The Panel Decision*

The panel in a split decision by Chief Judge Edwards reversed on the ground that the nonstatutory labor exemption from the antitrust laws immunized the defendants' conduct. The panel did not consider it dispositive that every case in which the Supreme Court has found this exemption applicable dealt with a collective bargaining agreement, because "the juxtaposition of policies giving rise to the exemption focuses on collective bargaining as a *process*, not merely on the *product* of that process" (slip op. 14). It noted that the National Labor Relations Act ("NLRA") similarly "focuses on collective bargaining as a process, rather than collective bargaining agreements alone" and established "a carefully defined bilateral process" protecting unions and employers alike (slip op. 16). Thus, the labor laws presume "a delicate balance of countervailing power" and "[i]njecting the Sherman Act into the collective bargaining process would disrupt this balance by giving unions a powerful new weapon, one not contemplated by the federal labor laws" (slip op. 18).

The panel was also impressed by the decisions of the Eighth and Second Circuits to adopt a broad nonstatutory labor exemption in, respectively, *Powell* v. *NFL*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), and *National Basketball Association* v. *Williams*, 45 F.3d 684 (2d Cir. 1995). Moreover, it was unable to find a logical endpoint for an exemption that was tied to a collective bargaining agreement (slip op. 19, 21). It assumed there was little impact on antitrust policy, since

the restrant primarily affected the labor market in the context of multi-employer bargaining (slip op. 22-26, quoting at length from *Williams, supra*). It concluded that the nonstatutory labor exemption "requires employees involved in a labor dispute to choose whether to invoke the protections of the NLRA or the Sherman Act" (slip op. 28).

Judge Wald dissented. In her view the majority's approach does not establish a "level playing field" but instead "sharply tilt[ed]" in favor of the owners (Dissent 1). She noted that the exemption endorsed by the majority went beyond any statutory or nonstatutory labor exemption recognized by the Supreme Court or, until recently, by the courts of appeals (Dissent 8-11). The result, she said, is to strengthen the employers' position, reduce their incentive to bargain, and allow them to impose terms not just as a bargaining tactic but as a substitute for a labor contract (Dissent, 12-16, 16-23). She concluded that "terms of employment unilaterally imposed by employers after impasse are *not* exempt from antitrust scrutiny under the nonstatutory labor exemption" (Dissent 24) (emphasis in original).

ARGUMENT

THE CONCERTED IMPOSITION OF TERMS BY EMPLOYERS ON EMPLOYEES IS NOT EXEMPT FROM THE ANTITRUST LAWS

The sweeping antitrust immunity adopted by the majority has no support in Supreme Court precedent. Its requirement that employees choose between the Sherman Act and the NLRA—between antitrust relief for wage fixing by an employer cartel and membership in a union—forces an unnecessary and inappropriate choice, and weakens both antitrust and labor policy. We also agree with Judges Wald and Lamberth that the implementation of multiemployer agreements on terms of employment derives nonstatutory antitrust immunity from

embodiment in a collective bargaining agreement. Since these employers imposed the disputed terms of employment on their employees without such an agreement, their action was not immune from scrutiny under the antitrust laws.

1. The immunity for unilateral employer group action adopted by the majority in this case is a new construct. Contrary to the majority's view, it is not a development of the nonstatutory labor exemption recognized by the Supreme Court. As that Court carefully summarized the law in *Connell Constr. Co.* v. *Plumbers Local 100,* 421 U.S. 616, 622 (1975), "a proper accommodation between congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions."

The Supreme Court's limitation to "union-employer agreements" was not inadvertent. Well before enactment of the NLRA, concerted action by a group of employers to control the labor market was recognized as unlawful under the antitrust laws. *E.g., Anderson* v. *Shipowners Ass'n,* 272 U.S. 359 (1926). The roots of the nonstatutory exemption, on the other hand, are firmly grounded in the statutory exemption for employees, which applies only "[s]o long as a union acts in its self-interest and does not combine with non-labor groups." *United States* v. *Hutcheson,* 312 U.S. 219, 232 (1941). Not surprisingly, therefore, the nonstatutory exemption likewise protects only "the unions' successful attempt to obtain [a] provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups." *Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676, 689-90 (1965). *Accord, United Mine Workers* v. *Pennington,* 381 U.S. 657, 661-64 (1965) ("a union may conclude a wage agreement with the multi-employer bargaining

unit without violating the antitrust laws"). The results of the various cases addressed by the Supreme Court have been equally unequivocal: collective bargaining agreements immediately promoting the unions' interests in eliminating competition based on wages and working conditions have been uniformly upheld, while those based on employer interests (including interests in their competitors' employment standards) have been rejected. *Compare American Federation of Musicians* v. *Carroll*, 391 U.S. 99, 107-12 (1968); *Jewel Tea, supra*, at 691-97; *Teamsters Union* v. *Oliver*, 358 U.S. 283, 293-94 (1959), with *FMC* v. *Pacific Maritime Ass'n*, 435 U.S. 40, 61-62 & n.20 (1978); *United Mine Workers* v. *Pennington, supra* 666-67; *Allen Bradley Co.* v. *Local 3, IBEW*, 325 U.S. 797, 809-11 (1945).[2]

Thus the Eighth Circuit was merely stating established law when it held that the nonstatutory exemption applies only to agreements that are "the product of bona fide arm's length bargaining" with the unions. *Mackey* v. *National Football League*, 543 F.2d 606, 614 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).[3] *Accord, In re Detroit Auto Dealers Ass'n*, 955 F. 2d 457, 463 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992).

2. The majority's decision, unlike the established body of law, does not base the nonstatutory labor exemption on workers' collective bargaining agreements. Instead, it creates a new, far broader implied antitrust immunity for employers based on the "process" of collective bargaining contemplated by the National Labor Relations Act, and in doing so strays far from the statutory grounding of the exemption.

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[2] In *Connell*, even an agreement with a union was held non-exempt in part because the union did not represent the signatory firm's employees. 421 U.S. at 625-26.

[3] Even the Eighth Circuit's more recent decision in *Powell* v. *National Football League, supra*, places its roots in this well-estabilshed body of precedent.

While the antitrust laws and the labor laws are both expressions of fundamental national policy, courts have no roving mandate to favor one over the other. Ordinarily, of course, "[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible." *United States* v. *Borden*, 308 U.S. 188, 198 (1939). Creation of a new implied antitrust immunity under the NLRA is a form of implied repeal. It is "well-established" that such repeal "is not favored and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system. . . . Repeal is to be regarded as implied only if necessary to make the [subsequent law] work, and even then only to the minimum extent necessary." *National Gerimedical Hospital* v. *Blue Cross*, 452 U.S. 378, 388-89 (1981) (internal citations omitted). The "accommodation" of labor and antitrust policies underlying the established exemption for union-employer agreements, *Connell*, *supra* at 622, does not imply a less stringent test, for it is firmly grounded in what "labor policy requires," *ibid.*, and overrides the antitrust laws only to the extent there is a "conflict" with such a requirement. *See Pennington*, *supra* at 666. But in this case, there is no conflict requiring a new exemption. Rather, the employers are seeking to establish, from a statute meant to enhance workers' rights to unionize, an implied Congressional intent to create a sweeping pro-management antitrust exemption which workers can avoid only by avoiding unions. See *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 316 (1965).[4] In that context, they have not come close to making the showing necessary for an immunity based on the process of bargaining.

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[4] Since these workers have chosen a union and would be deprived of that choice as the price of bringing an antitrust suit, the proposed new exemption stands on its head the concept of "voluntary unionism" embodied in the labor laws. Compare *Pattern Makers' League* v. *NLRB*, 473 U.S. 95, 105 (1985) (cited at slip op. 18).

The NLRA does primarily regulate the process of collective bargaining (slip op. 16). Under the labor laws, however, that process is not an end in itself, but a means to an end. It is a "process that look[s] to the ordering of the parties' industrial relationship through the formation of a contract." *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 485 (1960). The existing nonstatutory labor exemption, therefore, is simply a common sense recognition of the fact that the ultimate purpose of the labor laws and of the statutory labor exemption would be frustrated if such labor contracts, once reached, were declared invalid under the antitrust laws. *See Meat Cutters* v. *Jewel Tea Co., supra*, 381 U.S. 711-12 (opinion of Goldberg, J.). The only question in such cases is how far into the product market the negotiated restraints may extend.[5] Unilateral action by a group of employers to impose the terms that they should be negotiating with their employees' representatives plainly does not occupy the privileged position of being the desired end product of the bargaining process.

The majority nonetheless thought that unilateral employer agreements during the bargaining process should be totally immunized, because applying the antitrust laws

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[5] Three sets of opinions in the *Pennington* and *Jewel Tea* cases illustrate the dispute. Justice Goldberg would have held the agreements in both cases exempt from the antitrust laws as union contracts involving mandatory subjects of collective bargaining. 381 U.S. at 735. Justice Douglas would have held both agreements fully subject to the antitrust laws because they restrained the product markets. *Id.* at 672, 735. Justice White writing for the Court in *Pennington* found that wage agreement not exempt because it imposed terms outside the bargaining unit, *id.* at 665-66, and in *Jewel Tea* he thought the agreement exempt because the restraint on marketing hours had an "immediate and direct" effect on the working hours of the covered employees. *Id.* at 691.

A restraint on marketing hours similar to that in *Jewel Tea*, but adopted unilaterally by a group of employers to placate their salesmen and fend off unionization, was found not exempt in *In re Detroit Auto Dealers Ass'n, supra*, 955 F.2d at 461-67.

would disrupt "the delicate balance of countervailing power" "by giving unions a powerful new weapon, one not contemplated by the federal labor laws" (slip op. 18). That reason is seriously mistaken, however. There are numerous federal statutes, such as the Fair Labor Standards Act and the Occupational Health and Safety Act, which favor unions by raising the baseline from which negotiations start. The antitrust laws, we submit, are no different; their application simply means that negotiations should ordinarily start from a competitive wage level rather than a level set by an employer cartel.[6]

More importantly, the labor laws themselves are not concerned with any particular balance of power between unions and employers and are not intended to equalize the parties' bargaining power. *NLRB* v. *Insurance Agents' Int'l Union, supra,* 361 U.S. at 490. Indeed, the Supreme Court specifically held in that case that the Board may not attempt to "regulate the choice of economic weapons that may be used as part of collective bargaining." *Id.* at 490-98. But that is precisely what the majority has done here. It strips organized employees of an antitrust cause of action because it considers such a suit too powerful an economic weapon, and conversely allows those same employees to bring an antitrust action only if they surrender their right to unionize. There is simply no warrant in the labor laws for that holding and for the wholesale displacement of the antitrust laws it entails.

3. The panel's majority creation of a new and unsound antitrust exemption for management is sufficient reason for the Court to grant rehearing. But since at least one factor in the majority's thinking was its dissatis-

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[6] In the case of sports leagues, their joint venture characteristics might sometimes justify rule of reason treatment of unilateral league restraints on wage competition that would be considered per se illegal in different industries. *See McNeil* v. *NFL*, 790 F. Supp. 871, 896-97 (D.Minn. 1992). That is a matter separate from any labor exemption, however, and is not before the Court.

facton with various tests for determining when the management's nonstatutory exemption ends (slip op. 19-21 & n. 6), we wish briefly to address this point.

There is a strong argument that the recognized nonstatutory labor exemption should end when the contract containing the collective bargaining agreement has expired and the parties in post-expiration negotiations for a new contract have reached impasse. Up to that point the labor laws generally require employers to maintain the wages and working conditions set in the expired collective bargaining agreement. *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988); *NLRB* v. *Katz*, 369 U.S. 736, 743 (1962). If the antitrust exemption were withdrawn before impasse, employers would risk treble damage liability under the antitrust laws by complying with the labor laws' mandate to maintain the prior collectively set terms. But once impasse occurs, employers are free under the labor laws to alter the status quo and impose new terms of employment without regard to the union's consent, so long as they are within the scope of good faith proposals previously made to the union.

In practical world of labor-management relations, however, the precise point of impasse often is not easily identified and requires a complex factual determination. Moreover, the labor laws counsel caution in declaring an impasse in bargaining. Thus, there is a justification in labor policy for the implied immunity to endure for a reasonable time after impasse—for example, for such time as would be reasonable in the circumstances for the employers to take steps to ascertain, upon advice of counsel, whether impasse has in fact occurred, whether the restraint in question would be likely to violate the antitrust laws, and, if so, to adjust their business operations so as to eliminate the proposed restraint. There is also justification in labor policy for concluding that, in no event, should antitrust immunity continue once the employers, after impasse,

have jointly elected unilaterally to impose their proposed terms. For such unilateral action (which would constitute an unfair labor practice if made prior to impasse) would clearly indicate the employers' assumption that impasse has occurred and their intention to impose their terms even without the union's agreement.[7]

CONCLUSION

For the reasons stated, the Court should grant rehearing or alternatively rehearing in banc.

Respectfully submitted.

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(Certificate of Service Omitted in Printing)

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[7] When the members of a multi-employer group do impose terms, they may avoid antitrust liability by not acting in concert with each other—a result fully consonant with the labor laws, which leave individual employers at this point free to make temporary individual deals with the union pending adoption of a unit-wide agreement. *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 454 U.S. 404, 414-15 (1982).

(3)

No. 95-388

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,

Petitioners,

v.

PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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November 1995

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QUESTION PRESENTED

Whether members of a multiemployer bargaining unit are subject to antitrust liability to their employees for exercising, during the collective bargaining process, rights afforded them by the federal labor laws with respect to terms and conditions of employment.

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

The parties to the proceeding are listed at Pet. ii-iii. The only corporate respondents with a parent company are Houston Oilers, Inc. (KSA Industries, Inc.) and Pro-Football, Inc. (Jack Kent Cooke, Incorporated). The only corporate respondents with a nonwholly owned subsidiary are Indianapolis Colts, Inc. (Colt Center Company) and Minnesota Vikings Football Club, Inc. (Minnesota Vikings Ventures, Inc.).

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In The

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-388

ANTONY BROWN, *et al.*,

Petitioners,

v.

PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 50 F.3d 1041. The opinion of the district court (Pet. App. 64a-92a) is reported at 782 F. Supp. 125.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1995. A petition for rehearing was denied on June 12, 1995. The petition for a writ of certiorari was filed on September 11, 1995. The jurisdiction of this Court is invoked pursuant to 12 U.S.C. § 1254(1).

STATEMENT

1. Respondents, member clubs of the National Football League (NFL), are members of a multiemployer collective bargaining unit. Petitioners are members of the National Football League Players Association (NFLPA), the union certified as the exclusive bargaining representative of all NFL players. The subject matter of this litigation — the salaries of players eligible in 1989 to practice with NFL clubs but not to play in games — is a mandatory subject of collective bargaining under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*

In March 1989, as part of a series of roster reforms, the NFL authorized each member club to create a Developmental Squad, a group of six rookie or "first-year" players who would be permitted to practice with the club but not to play in games. To ensure that the most promising eligible players were not stockpiled or "stashed" by certain clubs on Developmental Squads, where they would be unavailable to other clubs needing their services in games, the NFL's authorizing resolution anticipated that all such players would be paid a uniform salary.

The NFL promptly sought to negotiate with the NFLPA terms and conditions of employment for Developmental Squad members. The NFLPA steadfastly refused to agree to a uniform salary. After four months of good faith efforts to

resolve the issue and with the parties plainly at impasse, the NFL unilaterally implemented its pre-impasse bargaining proposal, *i.e.*, that each Developmental Squad member be paid $1,000 per week, slightly less than the collectively bargained minimum salary for regular roster players. During the 1989 season — the only season at issue — 236 Developmental Squad members were each paid $1,000 per week for their practice services.

2. In May 1990, petitioners filed this lawsuit alleging that the NFL's implementation of the uniform salary term violated Section 1 of the Sherman Act.

In June 1991, after a class had been certified, the district court (Lamberth, J.) granted plaintiffs' motion for partial summary judgment, and denied the NFL's cross-motion, on the issue presented here: whether plaintiffs' claims were barred by the nonstatutory labor exemption from the antitrust laws. The district court held that implementation of the uniform salary term was not protected from antitrust challenge; it concluded that the exemption (1) had ended upon expiration of the previous collective bargaining agreement between the NFL and the NFLPA, (2) had ended when the parties reached impasse on the uniform salary issue, or (3) did not apply because the challenged restraint had not previously been embodied in a collective bargaining agreement. Pet. App. 72a-90a.[1]

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[1] The district court subsequently granted plaintiffs' motion for partial summary judgment, holding, under the rule of reason, that implementation of a uniform salary term violated Section 1 of the Sherman Act as a matter of law. Pet. App. 110a-114a. The damages issue was then tried to a jury, which was repeatedly told that the NFL had violated the antitrust laws. The jury returned a verdict that, after trebling, resulted in a judgment against the NFL of more than $30 million.

3. a. The court of appeals reversed. Pet. App. 1a-60a. Chief Judge Edwards' opinion for the court recognized that by implementing a collective bargaining proposal that had been negotiated in good faith to impasse, the NFL was exercising a fundamental labor law right. The court observed that this Court's precedents had "made clear that an employer's right to 'institute unilaterally the working conditions which he desires' is among the lawful 'tools of economic self-help' available to be utilized as a tactic in collective bargaining." *Id.* at 23a (quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965)). The court therefore determined that the NFL had been held liable under the antitrust laws for doing "exactly what federal labor policy condones." Pet. App. 5a.

For that reason, and because the uniform salary term had no anticompetitive impact on the market for the League's entertainment product, *id.* at 29a & n.8, the court of appeals held that the NFL is "exempt from Sherman Act liability in this case." *Id.* at 32a. The court of appeals determined that

> restraints on competition lawfully imposed through the collective bargaining process are exempted from antitrust liability so long as such restraints primarily affect only the labor market organized around the collective bargaining relationship. Thus, employees confronted with actions imposed lawfully through the collective bargaining process must respond not with a lawsuit brought under the Sherman Act, but rather with the weapons provided by the federal labor laws.

Pet. App. 4a-5a.

In reaching that conclusion, the court of appeals recognized that although the antitrust laws may apply to restraints on competition in *non*-unionized labor markets, "the

inception of a collective bargaining relationship between employees and employers irrevocably alters the governing legal regime. . . . [O]nce collective bargaining begins, the Sherman Act paradigm of a perfectly competitive market necessarily is replaced by the NLRA paradigm of organized negotiation — a paradigm that itself contemplates collusive activity on the parts of both employees and employers." Pet. App. 24a-25a.

In addition, reacting to petitioners' suggestion that such "routine practices of multiemployer bargaining violate the antitrust laws," Pet. App. 26a, the court reasoned:

> If the Players had been negotiating with a single football team (instead of the multi-employer group), there is no doubt whatsoever that that single employer lawfully could have taken unilateral action to impose a fixed salary for practice team players after bargaining in good faith to a point of impasse. Indeed, the players do not assert otherwise, for they recognize that this is standard fare in labor law. And nothing in the antitrust law is intended to proscribe such unilateral action by a single employer. So the heart of the Players' position appears to be that the presence of a multi-employer bargaining unit should make a difference under the antitrust law. This is a wholly untenable position . . . .

Pet. App. 25a. *See also id.* at 25a-28a (discussing precedents and legislative history).

In holding that "restraints on competition imposed through the collective bargaining process [are exempt], so long as such restraints operate primarily in a labor market characterized by collective bargaining," Pet. App. 29a, the court of appeals expressly agreed with decisions of the Eighth Circuit and the Second Circuit that had previously so held. Pet. App. at 21a-

22a, 25a-28a (citing *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), and *National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995), *petition for cert. filed* (U.S. July 24, 1995) (No. 95-137)).[2]

b. Judge Wald dissented. Pet. App. 34a-60a. Recognizing that the majority's decision was supported by decisions of the Eighth and Second Circuits, she nonetheless began with the premise that "[p]recedent is of limited assistance" in deciding the issue. Pet. App. 45a. She expressed the view that the majority's decision would allow employers to "impose labor market restraints that heretofore might have exposed them to antitrust liability" and would thereby "create[] new asymmetries in bargaining relationships." Pet. App. 46a, 49a.

Judge Wald joined the majority in recognizing that the nonstatutory labor exemption *does* embrace "multiemployer bargaining tactics" to which the union has not agreed, including actions by members of a multiemployer bargaining unit to lock out their employees. Pet. App. 53a n.7. She nonetheless proposed a rule — different from the respective rules urged by petitioners and the government here — that would exclude from the scope of the exemption "unilateral imposition of terms at impasse" even though, as she acknowledged, such employer actions "*sometimes* have tactical significance." Pet. App. 57a (emphasis in original).

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[2] Because the nonstatutory labor exemption issue was "dispositive," Pet. App. 9a, the court of appeals determined that it did not need to address the NFL's challenges to the Section 1 ruling or the damages issues. *Id.* at 4a.

Judge Wald would, in any event, have reversed the judgment and remanded on the ground that the district court had erred in granting summary judgment to petitioners under the antitrust rule of reason issue. Pet. App. 36a n.3.

c. The court of appeals denied rehearing en banc, over Judge Wald's dissent. Pet. App. 62a-63a.

REASONS FOR DENYING THE WRIT

Petitioners urge review by this Court principally on the ground that "the courts of appeals are sharply divided" over the question presented here, and that the decision below "represents a radical departure from the established test applied by the other circuits." Pet. 14. Petitioners are wrong, as the government's *amicus* brief *expressly* confirms. U.S. Br. 11.

The Solicitor General acknowledges that in 1991, when this Court declined to review the Eighth Circuit's decision in *Powell*,[3] "there was no conflict among the circuits on the precise issue presented." U.S. Br. 11. The Solicitor General also candidly admits that "[s]ince *Powell*, no conflict in the circuits has developed." *Id.* Indeed, as the government correctly recognizes, "the D.C. Circuit [in this case] and the Second Circuit [in *Williams*] have agreed with the Eighth Circuit [in *Powell*] that conditions of employment unilaterally imposed on unionized employees [through the exercise of labor law rights] by multi-employer associations may not be challenged under the antitrust laws." U.S. Br. 11. *See Williams*, 45 F.3d at 692 ("We thus agree with the decision in *Powell*"); Pet. App. 21a (same).

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[3] *See Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

Although the government continues to take issue with this consistent line of holdings, the D.C. Circuit and the Second Circuit, like this Court when it declined to review the Eighth Circuit's decision in *Powell*, had before them the government's briefs urging a different result. In each case, the government's position was rejected — not cavalierly, but rather with extended, thoughtful, and analytical opinions, each consistent with and reinforcing the others, by distinguished jurists with substantial experience in the governing areas of law.[4]

None of the arguments advanced in support of the petition warrants immediate review. The issue presented, which has received thoughtful treatment from three courts of appeals that have all reached the same result, has arisen only rarely, and not at all outside the specialized area of collective bargaining between professional sports leagues and their players. Recent experience confirms that the decisions of the courts of appeals have not adversely affected the collective bargaining process. And the courts of appeals have rejected the "dizzying array" of alternative proposals — "not one of [which] makes the slightest sense under established labor law principles" — offered by petitioners, the government and various commentators who favor excluding from the exemption one or more aspects of the collective bargaining process. Pet. App. 20a, 21a. Unless and until a conflict among the circuits results from these varied proposals, review by this Court is unwarranted.

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[4] The Second Circuit's unanimous opinion in *Williams*, for example, was written by Judge Winter and joined by Judges Pratt and Calabresi. Judges Meskill and McGlaughlin joined Judge Winter in the Second Circuit's recent unanimous decision in *Caldwell v. American Basketball Ass'n*, 66 F.3d 523 (2d Cir. 1995), which reached the same result. Chief Judge Edwards wrote the opinion for the court below, in which Judge Randolph joined.

I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS OR WITH PRIOR DECISIONS OF THIS COURT.

A. Petitioners' primary argument (Pet. 3-5, 14-20) is that the courts of appeals are in conflict on the question whether union consent to a challenged restraint is *necessary* for the nonstatutory labor exemption to apply. As the Solicitor General recognizes (U.S. Br. 11), there is no such conflict. Although several courts of appeals have considered whether a union-employer agreement is *sufficient* for the exemption to apply, *every* court of appeals to rule on the question presented here — whether a union-employer agreement is *necessary* — has rejected petitioners' position. *See Powell v. National Football League*, 930 F.2d 1293, 1298 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991); *National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995), *petition for cert. filed* (U.S. July 24, 1995) (No. 95-137); *Caldwell v. American Basketball Ass'n*, 66 F.3d 523 (2d Cir. 1995).[5]

Petitioners rely principally on *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). Indeed, they use the phrase (Pet. 18) "*Mackey* circuits" to refer to circuits that assertedly are in conflict with the D.C. Circuit's decision below, even though the circuit in which *Mackey* was decided has rejected petitioners' position.

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[5] Petitioners' counsel of record perceived no such conflict when, urging review and reversal of the Eighth Circuit's decision in *Powell*, as Solicitor General he informed this Court that *Powell* "does not conflict with any decision of this Court, nor is there a conflict in the circuits." Brief for the United States, No. 89-1421, at 17. Here, however, relying principally on cases decided prior to *Powell*, he asserts a conflict that warrants this Court's review.

In *Mackey*, the Eighth Circuit considered whether the nonstatutory labor exemption applied to restraints in a collective bargaining agreement; the issue presented there was whether union agreement was *sufficient* to require application of the exemption. *Mackey* did not consider whether an agreement was *necessary* for the exemption to apply. In its subsequent opinion in *Powell*, the Eighth Circuit made that absolutely clear: "Our discussion in *Mackey* was couched in terms of 'agreements' because in that case we were presented with [restraints] incorporated by two bargaining agreements." 930 F.2d at 1298.

In *Powell*, the Eighth Circuit held that the non-statutory labor exemption shielded from antitrust liability not only terms and conditions of employment that had been part of an expired collective bargaining agreement, but also additional terms (known as "Plan B") that the NFL, consistent with its rights under the labor laws, had implemented *without union agreement* after bargaining in good faith to impasse. *See Powell*, 930 F.2d at 1303 n.10. The Eighth Circuit ruled in *Powell* that agreement on the challenged restraint was not necessary, holding that after impasse the exemption protects from antitrust challenge a "unilateral change in terms and conditions of employment." *Powell*, 930 F.2d at 1302; *see id.* at 1300-01 (the exemption applies to "new or different employment terms that [were] reasonably contemplated within the scope of their pre-impasse proposals").[6] In short, as the

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[6] *See also* Petition for a Writ of Certiorari in *Powell v. NFL*, No. 89-1421, at 3 (In addition to the restraints "originally contained in a now expired collective bargaining agreement, . . . NFL owners have gone even further and unilaterally agreed to implement a new anticompetitive system called 'Plan B,' not contained in *any* previous agreement with the players." (emphasis in original)); *id.* at 7 (Plan B "had *never* been approved in or made part of any union agreement." (emphasis in original)); *McNeil v. National Football League*, 790 F. Supp. 871, 876 n.4 (D. Minn. 1992)

government has recognized here, the law of the Eighth Circuit — *the "Mackey* circuit" — is fully in accord with the decision below.[7]

The law of the other so-called "*Mackey* circuits" is also in accord. In *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers*, 431 F.2d 1004 (5th Cir. 1970), *cert. dismissed*, 404 U.S. 801 (1971), the Fifth Circuit considered the union's antitrust claim that Prepmore and another company had conspired to refuse to deal with the union concerning wages and working conditions. Even though the alleged restraint was not the subject of an agreement between labor and management, the Fifth Circuit affirmed dismissal of the antitrust claim on the basis of the nonstatutory labor exemption. *Id.* at 1007.[8]

("NFL defendants implemented [Plan B] without the approval of either the players or the NFLPA.").

[7] *See also Amalgamated Meat Cutters Local 576 v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979). *Wetterau*, decided soon after *Mackey*, involved an agreement between employers to replace striking workers with non-union employees. As here, management and labor had not agreed on the challenged restraint, which was implemented as part of the collective bargaining process. Nonetheless, after first determining that the challenged conduct was lawful under the labor laws, the court held that the nonstatutory labor exemption barred the antitrust claim. *Id.* at 135-36.

[8] *United Brotherhood of Carpenters Local 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983), does not raise any conflict with the decision below. In that case, the court said that "in order for a restraint of trade to be actionable under the Sherman Act, there must be a restraint upon commercial competition in the marketing of goods or services." 690 F.2d at 532 (citation omitted). Petitioners have conceded that there is no such restraint here. *See* Pet. 29a & n.8.

Petitioners' roster of "*Mackey* circuits" also includes the Ninth and Sixth Circuits. *See* Pet. 16. But the decisions upon which petitioners rely do not address the issue presented here — whether an agreement is *necessary* for the exemption to apply — and both courts have indicated in other cases that such agreement is *not* necessary.[9]

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[9] From the Ninth Circuit, petitioners rely on *Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades Dist. Council*, 817 F.2d 1391 (9th Cir. 1987). That case considered only whether an employer-union agreement is *sufficient* to fall within the exemption. In *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 905 (9th Cir. 1987), the court recognized that the nonstatutory exemption is *not* "limited to restraints imposed by collective bargaining agreements."

The law is the same in the Sixth Circuit. In *In re Detroit Auto Dealers Ass'n*, 955 F.2d 457 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992), local auto dealers agreed to close their showrooms on Saturdays and certain evenings. Because the challenged restraint was outside the scope of the collective bargaining process, the exemption did not apply. The court of appeals nevertheless observed that "[t]o say that collective bargaining is at the heart of the non-statutory labor exemption, however, is not to say that the exemption only applies to collective bargaining agreements." *Id.* at 466. *See also Newspaper Drivers & Handlers' Local 372 v. NLRB*, 404 F.2d 1159, 1163 (6th Cir. 1968) (holding that lockout, to which union had not agreed, did not violate antitrust laws), *cert. denied*, 395 U.S. 923 (1969).

In *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1203 (6th Cir. 1979), upon which petitioners also rely, the Sixth Circuit held that the challenged restraint, to which the union had agreed, was protected by the exemption; the court never suggested that an agreement was *necessary* for such a result. Judge Wald was therefore incorrect in suggesting that *McCourt* "refused to extend [the exemption] beyond employer-employee agreements." *See* Pet. App. 44a-45a. (*McCourt* was the sole appellate decision on which Judge Wald relied in concluding that, notwithstanding the holdings of *Powell* and *Williams*, "[p]recedent is of limited assistance in deciding" the issue presented here. Pet. App. 45a.)

In sum, the current Solicitor General is correct in recognizing that there is no circuit conflict on the question presented in this case. Petitioners' arguments to the contrary are spurious.

B. The prior decisions of this Court addressing the nonstatutory labor exemption plainly have not held that union agreement is required for the nonstatutory labor exemption to apply. Petitioners' implication to the contrary (Pet. 15-16) is undermined by the government's brief, in which the current Solicitor General reminds the Court of the government's position in *Powell*: "we suggested that . . . the question was then one of first impression." U.S. Br. 11. *See also* Pet. App. 13a-14a; p. 9, n.5, above. That suggestion was plainly correct.[10]

Forced to look further afield, petitioners assert (Pet. 20-26) that the decisions of the Second, Eighth, and District of Columbia Circuits conflict with the reasoning of two other lines of decision by this Court. These attenuated contentions are without merit.

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[10] This Court's prior decisions in this area each addressed an alleged *product* market restraint challenged by a party outside the collective bargaining relationship. *See Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 635 (1975) (the question is whether the challenged action "has a potential for restraining competition in a business market in ways that would not follow naturally from elimination of competition over wages and working conditions"); *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Allen Bradley Co. v. Local 3, International Brotherhood of Elec. Workers*, 325 U.S. 797 (1945). *See generally* Pet. App. 14a-15a. None of those cases holds that union consent is required for the exemption to apply in any case, much less a case, such as this, in which the restraint affects only the parties to the collective bargaining relationship.

1. Petitioners contend (Pet. 21-23) that the court of appeals' decisions conflict with statements by this Court that "[i]mplied antitrust immunity is not favored," *National Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross*, 452 U.S. 378, 388-89 (1981), and that courts should seek to "reconcile[]" statutory schemes "rather than holding one completely ousted," *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963). The decision below, like those of the Second and Eighth Circuits, is fully in accord with those principles.

Petitioners, as well as the government, build their arguments on a fundamentally flawed assumption: that each *individual* union member has a right to free competition over the terms and conditions of his or her employment. There is no such right. In a collective bargaining relationship, "the employee loses the right to bargain for the best price for his or her labor." *Caldwell v. American Basketball Ass'n*, 66 F.3d 523, 528 (2d Cir. 1995).

> Subject, of course, to federal statutes specifically overriding the NLRA, such as the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, or the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the terms of the individual's employment are left exclusively to the union and the employer to determine through processes and rules mandated by the NLRA.

Id.

This principle of law is well established in this Court's precedents, a fact that those urging review simply ignore. This Court has consistently ruled that the NLRA "extinguishes the individual employee's power to order his own relations with his employer." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *see also J.I. Case Co. v. NLRB*, 321

U.S. 332, 338 (1944) (the purpose of collective bargaining is to "supersede the terms of separate agreements of employees").[11] Thus, as the court of appeals recognized below, "once collective bargaining begins, the Sherman Act paradigm of a perfectly competitive market necessarily is replaced by the NLRA paradigm of organized negotiation — a paradigm that itself contemplates collusive activity on the parts of both employees and employers." Pet. App. 25a.

For this reason, among others, application of the nonstatutory labor exemption to the employers' exercise of their right to implement bargaining proposals at impasse does not displace or limit the scope of the antitrust laws. Nor does it cause employees "who choose collective bargaining [to have] distinctly fewer legal rights than employees who opt not to unionize." Pet. 22. It instead reflects recognition that, except to the extent that a product market may be adversely affected, individual interests of the kind protected by the antitrust laws simply do not exist in the *collectively* bargained "market" that determines the terms and conditions of union members' employment.[12]

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[11] In fact, absent union agreement, employers are barred from seeking to negotiate with individual employees. *J.I. Case*, 321 U.S. at 338-39. In that situation, "individual bargaining is not an exercise of a right to free competition under the antitrust laws; rather it is an exercise of a right derived from collective bargaining itself." *Caldwell*, 66 F.3d at 528. *Accord Silverman v. Major League Baseball Player Relations Committee, Inc.*, 1995 WL 574780 *5 (2d Cir. 1995) ("free agency is simply a collectively bargained method of determining individual salaries for one group of players"). *See* 29 U.S.C. §§ 158(d), 159(a) (obligating unionized employees to bargain collectively over wages).

[12] Employees who choose collective bargaining have *different*, not "fewer," rights compared to those who opt not to unionize. Such valuable rights include, for example, the right to negotiate as a group over wages and working conditions, the right to boycott employers (in a strike) in

Even if that were not the case, petitioners are wrong in asserting that the antitrust laws are "completely ousted" by the courts of appeals' decisions. The scope of the exemption reflected in the decision below (as well as in *Powell* and *Williams*) is narrowly tailored to reflect any necessary accommodation "between the congressional policy favoring *collective bargaining* under the NLRA and the congressional policy favoring free competition in *business markets*." *Connell Constr.*, 421 U.S. at 621-22 (emphasis added).

Under the courts of appeals' decisions, the nonstatutory exemption applies only to the employers' lawful exercise, in the context of collective bargaining, of rights created under the labor laws. In the context presented here, the exemption would apply to salary terms that had been proposed in good faith during the collective bargaining process and bargained in good faith to impasse. (There is no dispute that the salary term at issue here meets that test.) And even then, the exemption would not apply if the challenged conduct adversely affected competition in the product market, or if the employers colluded with entities outside the collective bargaining relationship.

2. There is no basis whatsoever for petitioners' additional contention (Pet. 24-26) that application of the nonstatutory labor exemption in the circumstances presented here conflicts with labor preemption decisions such as *Livadas v. Bradshaw*, 114 S. Ct. 2068 (1994), *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), and *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985). Petitioners made

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support of their good-faith bargaining demands, and the right to seek redress under the labor laws for a failure to bargain in good faith. 29 U.S.C. § 157.

no such argument below, and the government asserts no such conflict.

This case concerns the interaction of two federal statutory schemes; the cases upon which petitioners rely concern preemption of *state* law by federal labor law. Furthermore, state laws establishing minimum wages or occupational safety standards merely limit the range of terms upon which the parties may agree. In contrast, importation of federal antitrust laws into the collective bargaining process would directly interfere with "an employer's right to 'institute unilaterally the working conditions which he desires,' [one of] the lawful 'tools of economic self-help' available to be utilized as a tactic in collective bargaining." Pet. App. 23a (quoting *American Ship Bldg. Co.*, 380 U.S. at 316).

To the extent that labor preemption principles provide a useful analogy, the most relevant principle concerns preemption of state laws regulating conduct that even "arguably" constitutes an unfair labor practice under the NLRA. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959). *Garmon* preemption rests on the comprehensiveness of the regulatory regime created by the NLRA and Congress' assignment of jurisdiction to a specialized tribunal, the NLRB. *Caldwell*, 66 F.3d at 527.

The same concerns are raised by petitioners' position here. Importing antitrust remedies into the collective bargaining process would disrupt the comprehensive system of labor law established by Congress; antitrust actions would give employees an incentive "never [to] resort to the NLRB" or to "institute parallel administrative and antitrust proceedings with the risk of inconsistent adjudications." *Id.* Such a result would be fundamentally inconsistent with congressional intent "to leave to the Board's specialized judgment the inevitable questions concerning multiemployer bargaining bound to arise

in the future." *NLRB v. Truck Drivers Local 449 ("Buffalo Linen")*, 353 U.S. 87, 96 (1957) (citation omitted).

II. THE COURTS OF APPEALS HAVE CORRECTLY CONCLUDED THAT THE NONSTATUTORY LABOR EXEMPTION APPLIES TO RESTRAINTS IMPLEMENTED THROUGH THE COLLECTIVE BARGAINING PROCESS THAT DO NOT ADVERSELY AFFECT A PRODUCT MARKET.

The court of appeals' decision, like those of the Eighth Circuit in *Powell* and the Second Circuit in *Williams*, is plainly correct.

There is no dispute that the nonstatutory labor exemption seeks an "accommodation between the congressional policy favoring *collective bargaining* under the NLRA and the congressional policy favoring free competition in *business markets*." *Connell Constr. Co.*, 421 U.S. at 621-22 (emphasis added). Nonetheless, without regard to the presence or absence of an impact on "competition in business markets," and notwithstanding the settled view "that federal labor policy focuses on collective bargaining as a process, rather than collective bargaining agreements alone," Pet. App. 17a; *Caldwell*, 66 F.3d at 529 & n.1, petitioners and the government would limit the exemption not to "collective bargaining under the NLRA," but rather to collective bargaining *agreements*. *See, e.g.*, Pet. 15; U.S. Br. at 14-15.

Such a limitation has been rejected by every one of the *eight* courts of appeals to address the issue.[13] It was also rejected by Judge Wald, dissenting below, who recognized "that if the collective bargaining process is to work without undue interference from antitrust law, multiemployer 'bargaining tactics' must fall within the scope of the nonstatutory labor exemption." Pet. App. 53a n.7.

Petitioners and the government recognize, as they must, that the nonstatutory labor exemption protects aspects of the collective bargaining *process* other than the ultimate agreement. For example, there is no dispute that if employers exercise their labor law right to lock out their employees, their actions are protected by the nonstatutory labor exemption even though the union does not agree to the lockout. Pet. App. 22a-23a; *id.* at 53a n.7 (Wald, J., dissenting). *Accord Williams*, 45 F.3d at 691-92.[14] And that is true even though a lockout — a concerted refusal to deal — would restrain the labor "market" far more severely than the restraint at issue here.

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[13] In addition to the opinions of the six courts of appeals addressed at pages 9-12, above, *see Mid-America Regional Bargaining Ass'n v. Will County Carpenters*, 675 F.2d 881, 886 n.14 (7th Cir.) (the purpose of the non-statutory labor exemption is to protect "the collective bargaining *process* commanded by the labor laws" (emphasis in original)), *cert. denied*, 459 U.S. 860 (1982); *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 847 n.14 (3d Cir. 1974) ("To preserve the integrity of the negotiating *process*, employers who bargain in good faith must be entitled to claim the antitrust exemption." (Emphasis added.))

[14] *See generally, e.g., American Ship Bldg. Co. v. NLRB*, 380 U.S. at 315 (recognizing "the legitimacy of [lockouts] as a means of applying economic pressure in support of bargaining positions"); *Buffalo Linen*, 353 U.S. at 87 *et seq.*

More generally, as the dissent below recognized, "multiemployer 'bargaining tactics' must fall within the scope of the nonstatutory labor exemption." Pet. App. 53a n.7 (Wald, J., dissenting). That conclusion is inescapable because, as this Court has recognized, the collective bargaining process established by the NLRA "is premised on the belief that collective discussion *backed by the parties' economic weapons* will result in decisions that are better for both management and labor and for society as a whole." *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 678 (1981) (citations omitted) (emphasis added).[15]

This Court has previously confirmed, as the dissent acknowledged below (Pet. App. 51a), that an employer's right at impasse to "institute unilaterally the working conditions which he desires" is among the lawful "tools of economic self-help" available to be used in the collective bargaining process. *American Ship Bldg. Co.*, 380 U.S. at 316.[16] There is nothing in the case law or in federal labor policy that would warrant treating this right differently from all other "tools of

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[15] *See also NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 489 (1960) (collective bargaining process defined by "availability of economic pressure devices to each [party] to make the other party incline to agree on one's terms").

[16] Judge Wald assumed that at impasse, "an agreement is no longer in sight or even being sought," and that "hope [no longer] exists that an agreement may be reached." Pet. App. 60a, 54a. But this Court's holdings make clear that impasse, "a recurring feature of the bargaining process, . . . is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'" *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 412 (1982) (citation omitted). *See generally* pp. 25-27, below (discussing recent collective bargaining agreements in professional football, basketball and hockey, all of which followed multiple instances of impasse in negotiations).

economic self-help" afforded to employers under the labor laws, all of which were intended by Congress to be "unrestricted by *any* governmental power to regulate." *Lodge 76 Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 141 (1976) (citation omitted).[17]

Moreover, such a distinction would run counter to federal labor policy for at least two reasons. First, management's right at impasse to implement its proposed terms of employment is a necessary counterweight to the additional economic weapon that, under the federal labor laws, the union secures at impasse: the right to make *interim* agreements with individual members of the multiemployer bargaining unit, thereby gaining the opportunity to "whipsaw" management. *See Bonanno Linen*, 454 U.S. at 415-16 & n.9. The economic force of this added right is significant. As the dissenters in *Bonanno Linen* argued:

> By allowing the union to negotiate interim agreements in order to whipsaw the employer group and yet denying the employers the necessary defense of withdrawal [from the multiemployer collective bargaining unit], the Board is

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[17] Petitioners are badly mistaken in claiming that the labor law right to implement proposals at impasse "is simply a continuation of [the employers'] common law right to operate their businesses in support of their own commercial interests." Pet. 23. That unsupported assertion is conclusively undermined by the continuing labor law requirements that limit this right to terms previously negotiated with the union in good faith to impasse. *E.g.*, *NLRB v. Katz*, 369 U.S. 736, 745 (1962). These restrictions confirm that, after impasse, the parties remain in a collective bargaining relationship and that the employers' right to operate their businesses continues to be governed and regulated by the labor laws. *See also* p. 20, n.16, above.

> hardly living up to its asserted — and mandated — commitment to evenhandedness.

Id. at 423 (Burger, C.J., and Rehnquist, J., dissenting).[18] Thus, the right to implement proposals at impasse is necessary to *maintain* the balance of economic tools created by the labor laws.

Second, labor law *requires* that after impasse, members of a multiemployer bargaining unit must continue to bargain *as a unit* for a new permanent agreement; individual employers may not withdraw from the unit at that time. *See Bonanno Linen*, 454 U.S. at 412 & n.8. Thus, *voluntary* collusive actions by *independent* actors, which ordinarily motivate antitrust concerns, simply do not exist in the context of multiemployer bargaining, which "itself contemplates collusive activity on the part of both employees and employers." Pet. App. 25a.[19]

The presence of "a multiemployer organization does not alter the fact that there is no right to bargain individually, nor

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[18] The very purpose of multiemployer bargaining is to "prevent[] a union from whipsawing employers by shutting them down one-by-one, a tactic that forces each employer to give in to the union's most extreme demand." *Williams*, 45 F.3d at 688 (citing *Bonanno Linen*, 454 U.S. at 409-10 & n.3).

[19] Moreover, the NLRB and at least one court of appeals have held that sports leagues *must* engage in multiemployer bargaining from the outset. *See North Am. Soccer League v. NLRB*, 613 F.2d 1379 (5th Cir.) (affirming the NLRB's determination that teams in a soccer league must bargain as a 'joint employer'), *cert. denied*, 449 U.S. 899 (1980). *See also Williams*, 45 F.3d at 689 ("In the sports industry, multiemployer bargaining exists [in part] because some terms and conditions of employment must be the same for all teams . . . ."); *id.* at 692 ("sports leagues are an exception to the principle of voluntariness").

does it create an antitrust claim where none existed." *Caldwell*, 66 F.3d at 530. The existence of multiemployer bargaining, by which employers "band together to act as a single entity in bargaining with a common union or unions," *Williams*, 45 F.3d at 688, does, however, underscore the fact that the context in which Section 1 of the Sherman Act is traditionally applied — a market restrained by the *unauthorized* joining together of independent competitors — is simply not present here.

For these reasons, among others, it is simply wrong to suggest that unless this Court were to exclude from the scope of the exemption the labor law right to implement at impasse, the collectively bargained "playing field [would be tilted] in employers' favor." *See* Pet. App. 34a (Wald, J., dissenting).[20] Unionized employees have never had an antitrust remedy for actions taken by employers to exercise their collective bargaining rights under the labor laws.

To the contrary, importing the antitrust laws into the collective bargaining process — which could not possibly achieve the Sherman Act's objective of free competition, as demonstrated above — would, by judicial fiat, simply provide employees with an additional, inherently coercive bargaining tactic and thereby "subvert fundamental principles of our federal labor policy as set out in the [NLRA]." *Wood v.*

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[20] None of the cases cited by the dissent below (Pet. App. 37a) for the proposition "that the antitrust laws presumptively apply to [multi]employer-imposed restraints on labor markets" involved the collective bargaining process. *See, e.g., Cordova v. Bache & Co.*, 321 F. Supp. 600, 608 (S.D.N.Y. 1970) (defendants' action was not "in anticipation of, or connected in any way with, multi-employer collective bargaining").

National Basketball Ass'n, 809 F.2d 954, 959 (2d Cir. 1987).[21]

In short, *nothing* in the labor laws or in the precedents of this or any other court supports excluding from the scope of the exemption the employer's right at impasse to implement a pre-impasse proposal bargained in good faith with the union. The courts of appeals have plainly reached the correct result: "only the most crude accommodation of the federal labor and antitrust policies would shield union-employer agreements from Sherman Act liability, but leave exposed the lawful means employed in the process to reach those agreements." Pet. App. 20a.

III. THE QUESTION PRESENTED HAS NOT ARISEN OUTSIDE PROFESSIONAL SPORTS, AND RECENT EXPERIENCE DEMONSTRATES THAT THE COLLECTIVE BARGAINING PROCESS HAS NOT BEEN ADVERSELY AFFECTED BY THE DECISIONS OF THE COURTS OF APPEALS.

A. There is no basis whatsoever for petitioners' dire prediction (Pet. 26) that the court of appeals' decisions "will subvert the prospects for peaceful labor-management bargaining in major sectors of the national economy." As the Second Circuit has observed, "there is no precedent outside

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[21] Here, for example, injecting the antitrust laws into the collective bargaining process enabled the NFLPA to "invoke the antitrust laws and their threat of treble damages to gain an advantage in bargaining over a salary provision about which [NFLPA] members do not care deeply enough to strike." Pet. App. 20a. Such a radical shift in the balance between employers and employees would "cause a massive reshaping of the institution of collective bargaining." *Williams*, 45 F.3d at 691.

sports for ever initiating this genre of litigation," an antitrust challenge to the employers' implementation at impasse of its pre-impasse bargaining proposal. *Caldwell*, 66 F.3d at 530. Indeed, neither petitioners nor the government cite a single case outside the sports context — and we are aware of none — in which this issue has even arisen since the Eighth Circuit's decision over six years ago in *Powell*.

Given that the issue has arisen only rarely in the 105 years since passage of the Sherman Act — and not at all outside the sports context (which involves "a barely discernible fraction of the nation's unionized employees," *Caldwell*, 66 F.3d at 531) — there is no reason to assume that the court of appeals' decision will have a material impact on collective bargaining in any market. That is particularly true in light of the fact that the "professional sports industry has a very different history and very different economic imperatives" than other industries. *See generally Silverman*, 1995 WL 574780 at *5. *Accord*, *Wood*, 809 F.2d at 961 (collective bargaining between professional athletes and leagues raises "numerous problems with little or no precedent in standard industrial relations").

Petitioners engage in revisionist history — if not total fiction — in suggesting that recent "tumultuous" labor relations in professional sports came about "[l]argely as a result of *Powell*." Pet. 27. In *Powell* itself, which followed a strike by NFLPA members against the NFL, the Eighth Circuit referred to the "often tempestuous relationship" between players and management, a phenomenon that can be traced back to the origins of professional sports. 930 F.2d at 1303. *Powell* is no more responsible for such "tumult" than Judge Lamberth's June 1991 decision below, which allowed unions representing professional athletes to exploit, as a collective bargaining tactic, the potential for antitrust remedies if employers sought to exercise their labor law rights.

It bears mention, however, that the potential for such exploitation diminished with the July 1994 district court decision in *Williams*, which embraced the Eighth Circuit's holding in *Powell*. *National Basketball Ass'n v. Williams*, 857 F. Supp. 1069, 1078 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2d Cir. 1995). Not long thereafter, the National Hockey League reached agreement with its players on a new labor agreement that will continue in effect at least through the year 2000, demonstrating that "collective bargaining, instead of litigation, can operate as an effective means of union-employer dispute resolution in professional sports." Pet. App. 31a-32a. And then, following the Second Circuit's decision in *Williams* and the D.C. Circuit's decision below, the National Basketball Association and its players' union reached agreement in principle on a collective bargaining agreement that will remain in place until at least 2001; that agreement, among other things, is expected to lead to withdrawal of the petition for a writ of certiorari in *Williams*. *See* No. 95-137, Letter of Oct. 5, 1995, from Howard L. Ganz to Francis J. Lorson.

The NFL and the NFLPA now have a collective bargaining agreement that will extend until the year 2000, Pet. App. 9a n.3, and that agreement may soon be extended well into the next century.[22] Among other things, the current NFL agreement determines the salaries of practice players; consequently, the underlying issue in this case is of no continuing significance.

One thing can therefore be said without dispute: Labor relations in professional football, basketball, and hockey are now quite stable, and the prospect is that those relationships

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[22] *See, e.g.*, David Aldridge, *League And Its Players Union Can Hardly Wait To Talk Deal*, Washington Post, November 1, 1995, at C4.

will remain stable for some years to come.[23] From the standpoint of professional sports — the only industry in which an employers' right to implement at impasse has ever been challenged — there is no basis whatsoever for immediate review by this Court of the issue presented here.

B. As the court of appeals noted, those who advocate applying the antitrust laws to some part of the collective bargaining process have put forward a "dizzying array" of proposals, *not one of which has been accepted by a court of appeals*. *See* Pet App. 20a-21a (citing proposals that the exemption (i) terminate with the expiration of the collective bargaining agreement (ii) terminate at impasse (iii) terminate sometime soon after impasse); Pet. App. 50a (proposal to exclude from exemption certain collective bargaining tactics) (Wald, J., dissenting); *see also id.* at 21a (none of the proposals "makes the slightest sense under established labor law principles"). Those "who favor leaving certain aspects of the collective bargaining process unshielded by the exemption cannot agree on any point at which the exemption must expire in order to properly accommodate federal labor policy." Pet. App. 20a. The government here, for example, advances a proposal different from the proposal advanced by petitioners below, and both of those proposals differ from the proposal suggested by the sole dissenter on the court of appeals, Pet. App. 53a n.7.

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[23] The nonstatutory labor exemption has no application to professional baseball, which, unlike other professional sports, has a blanket exemption from the antitrust laws. *Flood v. Kuhn*, 407 U.S. 258 (1972). Even if that were not the case, the nonstatutory labor exemption would not have applied to baseball's recent labor dispute, in which management did "not [even] claim that it had bargained to an impasse" over the disputed terms and conditions of employment. *Silverman*, 1995 WL 574780 at *5.

The implications of many of these proposals are unclear and potentially far-reaching. Some call into question the entire process of multiemployer bargaining. Others raise serious problems of administrability. *See* Pet. App. 21a n.6. Certiorari should not be granted to resolve such an academic debate, especially one involving an issue that has rarely arisen in the past and is not likely to arise anytime soon. Unless and until one of those proposals generates a conflict in the circuits, review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 95-388

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,
Petitioners,
v.
PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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STATEMENT

The fact that the Government has filed an *amicus* brief on its own motion recommending without qualification that the Court grant the petition for certiorari in this case amply demonstrates that resolution of the important issue presented is essential to harmonization of the federal labor and antitrust laws. In particular, the Government fully agrees with petitioners that the Court of Appeals' dramatic expansion of the nonstatutory labor exemption "is wrong as a matter of law, and may do serious harm to the nation's antitrust and labor policies if not reversed," Brief for United States as Amicus Curiae 11—a view shared both by the federal antitrust enforcement agencies and the National Labor Relations Board. *See id.* at 1, 11 n.1. Moreover, the Government concurs that the present case "presents the issue for review in a clear fashion," and in every respect is the most "suitable vehicle" for exercise of the Court's certiorari jurisdiction. *Id.* at 12; *see id.* at 12-13.[1]

In their brief in opposition, respondents offer no genuine basis for disputing the compelling certworthiness of the issue or the Government's conclusion that this case provides the best opportunity for its resolution. Rather, in an evident effort to obscure and confuse, respondents have put forward a litany of arguments that mischaracterize numerous lower court decisions, misstate key labor law precepts, and mislead concerning the profound consequences of the Court of Appeals' extraordinary decision. In this reply brief, petitioners will endeavor to clear the haze.

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[1] The Government has suggested that the Court hold the petition in *Williams v. National Basketball Ass'n*, No. 95-137, pending a decision in the present case. U.S. Br. 13. Since the petitioners in *Williams* have apparently entered into recent negotiations with the NBA that may result in the withdrawal of their case, *see* Opp. 26, petitioners agree with the Government's suggestion and urge the Court to consider the present petition separately from the *Williams* petition.

ARGUMENT

I. THE CIRCUITS ARE IN CONFLICT OVER WHETHER UNION CONSENT IS A PREREQUISITE TO INITIATION OF THE NONSTATUTORY LABOR EXEMPTION.

Respondents strain mightily to cover up the division that exists among the circuits by creating a false distinction between the "sufficien[cy]" and the "necess[ity]" of union-employer agreement for application of the nonstatutory labor exemption. Opp. 9; *see id.* at 10-12. They claim that "*every* court of appeals to rule on the question" has rejected the necessity of union consent. *Id.* at 9 (emphasis in original) (citing *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), and *National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995), *pet. for cert. pending*, No. 95-137 (U.S. filed July 24, 1995)). These claims completely fall apart upon careful inspection of the cases.

In reality, the D.C. Circuit in this case was faced with a significantly different question from that presented in *Powell* and *Williams*, both of which dealt with employer restraints previously agreed to by the unions and concededly once protected by the labor exemption. *Powell* and *Williams* thus involved the question of when, once begun, the exemption in such cases should *end*. Whether or not there is a clear divergence on that precise issue, those courts assuredly "strayed from the proper basis of the exemption" delineated by this Court, U.S. Br. 15. The D.C. Circuit's decision here, however, plainly *does* conflict with decisions of the Eighth, Fifth, Sixth and Ninth Circuits, including the seminal opinion in *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977), over the critical question of when the nonstatutory labor exemption *begins*.[2]

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[2] The Government states without discussion that "[s]ince *Powell*, no conflict in the circuits has developed." U.S. Br. 11. But it is apparent the Government is focusing only on the issue addressed

The Court of Appeals held below that upon "the *inception* of a collective bargaining relationship," the nonstatutory exemption immunizes all multi-employer restraints on competition for labor services regardless of union consent—that is, "once collective bargaining *begins*," the employees automatically lose their antitrust rights. App. 24a-25a (emphasis added). In stark contrast, the Eighth Circuit in *Mackey* explicitly held that "[t]o determine the applicability of the nonstatutory exemption *we must first decide* whether there has been any *agreement* between the [union and the employers] concerning the [restraint at issue]." 543 F.2d at 612 (emphasis added). Thus, the Eighth Circuit devised a test under which the exemption begins "*only* where the *agreement* sought to be exempted is *the product of bona fide arm's-length bargaining*," *id.* at 614 (emphasis added), and held that "the exemption *cannot be invoked*" where there has been no such bargaining "agreement." *Id.* at 623 (emphasis added). Respondents' assertion that "*Mackey* did not consider whether an agreement was *necessary* for the exemption to apply," Opp. 10 (emphasis in original), is utterly false.

In *Powell*, the Eighth Circuit explicitly reaffirmed the *Mackey* test, 930 F.2d at 1298—a test that concededly had been satisfied in *Powell* by the NFLPA's prior agreement to the challenged restraint. *Id.* at 1299. The *Powell* court simply addressed the distinct question of expiration: "[n]ow that the 1982 Agreement is terminated, . . . we must decide whether the nonstatutory labor exemption *has also expired* or, alternatively, whether under the circumstances of this case [it] *continues*." *Ibid.* (emphasis added).[3] *Powell*, therefore, does nothing to diminish the

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in its *amicus* brief in *Powell*—*i.e.*, whether "the employers' immunity *terminates* [upon impasse]." Id. at 10 (emphasis added). The Government overlooks the clear conflict that exists at the other end—regarding the exemption's application in the first instance.

[3] Respondents are simply wrong that *Powell* extended the labor exemption to "additional" restraints on competition that the NFL

conflict between the present case and *Mackey*.[4]

The three other circuits that have followed and applied the *Mackey* test for initiation of the nonstatutory exemption are also in clear conflict with the D.C. Circuit's decision here. In *Carpenters Local No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983), the Fifth Circuit specifically held that where a restraint is imposed by members of a multi-employer bargaining unit and the "antitrust claims do *not* allege that [the employers] have entered into *agreements with any unions*," the exemption could not be invoked. *Id.* at 530-31 (emphasis added) (citing *Mackey*). Similarly, the Sixth Circuit in *In re Detroit Auto Dealers Ass'n*, 955 F.2d 457 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992), refused to apply the nonstatutory labor exemption to a unilateral agreement among car dealers to restrict showroom hours on the ground that the agreement was *not* the product of arm's length bargaining with the salesmen's unions. *Id.* at 462-67 (relying on *Mackey*). *See*

"had implemented *without union agreement*" after impasse. Opp. 10 (emphasis in original). In truth, the revisions in "Plan B" referred to in *Powell* involved only the *relaxation* for some players of the challenged restraints that the NFLPA had previously agreed to. *See* 930 F.2d at 1303 n.10 (the proposal unilaterally implemented by the League simply "offered free agency to some players but retained the [challenged reserve] system for many others").

[4] Respondents claim that *Amalgamated Meat Cutters Local No. 576 v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979), extended the nonstatutory exemption to a unilateral employer "restraint," Opp. 11 n.7, but that is misleading. The *Wetterau* court simply held that a routine striker replacement agreement did not violate antitrust law where it "had no anticompetitive effect" beyond labor relations at a single store. *Id.* at 136 & n.7 Moreover, striker replacement is a protected bargaining *tactic* under the labor laws, not a unilaterally imposed restraint on the terms of employment; thus, *Wetterau* is also explained on the basis of the important distinction between "tactics" and "terms" developed in this Court's preemption cases. *See* Pet. 24-25; App. 50a-58a & 53a-54a n.7 (Wald, J., dissenting).

also McCourt v. California Sports, Inc., 600 F.2d 1193, 1198 (6th Cir. 1979) (adopting *Mackey* test).[5]

Finally, the Ninth Circuit in *Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades Dist. Council*, 817 F.2d 1391 (9th Cir. 1987), specifically adopted the *Mackey* test and affirmed the application of the nonstatutory labor exemption where the defendants persuasively showed, *inter alia*, that the challenged labor project agreements "were the product of bona fide arm's length bargaining" with a union. *Id.* at 1394. Respondents cite the Ninth Circuit's earlier opinion in *Richards v. Neilsen Freight Lines*, 810 F.2d 898 (9th Cir. 1987) (Kennedy, J.), which held that labor agreements other than collective bargaining agreements could fall within the exemption where they bear "a close and substantial economic relation to a union's legitimate attempt to organize a specific employer." *Id.* at 904. The court most certainly did *not* hold, as respondents imply, Opp. 12 n.9, that the exemption may be invoked *in the absence of union agreement*.

In the end, respondents cannot point to a single case, other than the Court of Appeals' decision below, in which a court has held the nonstatutory labor exemption to immunize multi-employer restraints that lack any hint of prior union consent. Respondents quote the Court of Appeals' frustration over the " 'dizzying array' " of rules proposed by the courts and commentators to govern the "termina[tion]" of the labor exemption—with some focusing on expiration of the bargaining agreement and others on impasse. Opp. 27 (quoting App. 21a). But, in truth, the considerable controversy regarding the termination of

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[5] Contrary to respondents' claim, the court in *Detroit Auto Dealers* did not rule that the dealers' restraint was "outside the scope of the collective bargaining process." Opp. 12 n.9. Indeed, several dealers had negotiated collective bargaining agreements with the unions, and "[s]ome [of the showroom] closings were in fact collectively bargained." 955 F.2d at 460 (internal quotation marks omitted); *see id.* at 467-69 & n.9 (applying the exemption to such agreements).

the nonstatutory exemption bespeaks a unitary consensus on the *beginning* of the exemption: it begins with union-employer *agreement*, as defined by *Mackey*. There would be no such "dizzying array" of proposals if the other courts had recognized what the D.C. Circuit and respondents now urge—that union agreement is irrelevant to the entire exemption and that all that matters is the "inception of a collective bargaining relationship." App. 24a.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT IN AT LEAST TWO SIGNIFICANT RESPECTS.

In response to our arguments that the D.C. Circuit's decision conflicts with this Court's cases requiring a reconciliation between the antitrust laws and competing federal statutes and with this Court's labor preemption decisions, respondents offer only a series of fundamental misstatements about the prerogatives and duties of parties under the labor laws.[6]

First, respondents repeatedly intone that employers have a "right" affirmatively granted by the labor laws to implement their bargaining proposals upon impasse, and that this "fundamental labor law right" would be infringed if subjected to antitrust scrutiny. Opp. 4, 15, 20-21 & n.17, 24. That simply is not so. Employers, like unions, have no affirmative rights granted by the labor laws; the only "rights" created by the NLRA are the employees' rights under § 7 to engage in or refrain from concerted activities. *See* 29 U.S.C. § 157. The employers' ability to implement their proposals upon impasse is merely one of many *prerogatives* the employers enjoy that find their source in other areas of the law, principally common law. Within the context of the bargaining process, these employer prerogatives are *regulated* to one degree or another by the labor laws. *See, e.g., NLRB v.*

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[6] Respondents are flatly wrong when they claim that the NLRA implied preemption decisions were not raised in the Court of Appeals. Opp. 16-17. These cases were discussed extensively in the dissent, *see* App. 54a-57a, and in the petition for rehearing.

Katz, 369 U.S. 736, 745 (1962). To the extent they are *unregulated*, however—as they are to a large extent upon impasse—the application of the antitrust laws presents no irreconcilable conflict. Individual employers remain free upon impasse to implement their proposals unilaterally; they simply cannot do so as a cartel without risking the same antitrust liability that would ordinarily apply.

Second, respondents claim that petitioners' and the Government's arguments depend upon the assumption that union members have a right to negotiate individually over the terms and conditions of their employment. Opp. 14. Not true. We claim only that unionized employees, whether individually or as a group, have the same rights as nonunion employees to protection from employer collusion in setting employment terms—absent agreement to the contrary—as this Court's implied preemption decisions make plain. *See* Pet. 24-25. Those rights are not in tension with the labor laws. Moreover, this Court has emphasized the "care taken" in its decisions to "reserve a field for the individual contract, even in industries covered by the [NLRA]." *J.I. Case Co. v. NLRB*, 321 U.S. 332, 336 (1944). The Court explained that where there is "great variation in circumstances of employment or capacity of employees"—as is clearly the case, for example, in professional sports and entertainment—it is "possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining." *Id.* at 338.[7]

Third, respondents argue that employers enjoy protection when they engage in the tactic of a lockout, even though, respondents claim, a lockout "would restrain the labor 'market' far more severely than the restraint at issue here." Opp. 19. The latter point is assuredly un-

[7] Respondents mistakenly assert that the terms of the individual's employment are left exclusively to the collective bargaining process "[s]ubject [only] to federal statutes *specifically* overriding the NLRA." Opp. 14 (emphasis added) (quoting *Caldwell v. American Basketball Ass'n*, 66 F.3d 523, 528 (2d Cir. 1995)

true. Bargaining tactics like lockouts and strikes impose their painful economic consequences on employers as well as on employees and are thus a real spur to mutual compromise. The employers' unilateral implementation of a salary term, however, imposes no reciprocal costs on the employers. For that reason, a lockout is likely to be shortlived, while a unilaterally implemented salary restraint will be maintained for as long as the employers can get away with it—and where, as here, the costs of the restraint are imposed on only a small subset of employees, there is little incentive for the union to strike and thus little chance (absent an antitrust action) that the employers will back down.

In short, unlike a lockout, which *is* calculated to produce a bargaining agreement, the multi-employer restraint at issue in the present case was designed precisely to *avoid* agreement with the union. Antitrust immunity for this kind of restraint will inevitably be destructive of both labor and antitrust policies.[8]

(citing the Fair Labor Standards Act and the Civil Rights Act of 1964 as examples). In truth, the Fair Labor Standards Act and the Civil Rights Act mandate certain standards that apply to collectively bargained employment terms without any "specific" override of the NLRA. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 755 (1985) ("[I]t never has been argued successfully that minimal labor standards imposed by other *federal* laws were not to apply to unionized employers and employees.") (emphasis in original). The "backdrop" rights created by those statutes apply generally to employment terms in exactly the same way that the background rights created by the antitrust laws do.

[8] Respondents rely by "analogy" on the Second Circuit's recent *Garmon* preemption decision in *Caldwell v. American Basketball Ass'n*, 66 F.3d at 527. Opp. 17. Although *Caldwell* was correctly decided under the doctrine of preemption of state-law unfair labor practice claims, *see San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959), *Caldwell*'s expansive reasoning, which simply reiterates the Second Circuit's earlier opinions in *Williams* and *Wood v. National Basketball Ass'n*, 809 F.2d 954 (2d Cir. 1987), exposes the radical potential of the D.C. Circuit's decision here. Suppose the plaintiff in *Caldwell* had been collectively boycotted not for his union activity but for his political activities or

III. IF LEFT UNREVIEWED, THE COURT OF APPEALS' DECISION WILL HAVE WIDESPREAD HARMFUL CONSEQUENCES FOR LABOR RELATIONS AND COMPETITION.

Respondents blithely assert that the issue presented in the petition will have no impact beyond the narrow world of professional sports and that, even within that world, "this case is of no continuing significance," since labor relations throughout sports "are now quite stable" and will remain so "for some years to come." Opp. 26-27. Those assertions are simply extraordinary.

If left in place, the D.C. Circuit's decision promises to alter the scope of the judge-made labor exemption in every context in which it has been invoked, but especially in industries where individual contract negotiations occur within the framework of a basic collective bargaining agreement. In the first place, respondents simply pretend away the turbulent experiences that have befallen labor relations in professional football, hockey and basketball as a result of decisions like the present one. *See* Brief for National Hockey League Players Ass'n and National Football League Players Ass'n as Amici Curiae in Support of Petitioners 5-10; U.S. Br. 11-12.[10] This turbulence, moreover, is likely to be a recurring—indeed, almost yearly—phenomenon, since each of the four major sports has a four to six year bargaining cycle, and in the

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for playing in another league, like the plaintiff in *Radovich v. NFL*, 352 U.S. 445 (1957). The reasoning of *Caldwell*, like that of the Court of the Appeals in the present case, would clothe the employers' conduct in immunity and would leave the plaintiff with no redress other than whatever grievance procedure may be available under a collective bargaining agreement. (In *Caldwell*, there was no agreement in place and no such procedure available.)

[10] The decision below is also likely to have a significant impact on labor relations in major league baseball if pending legislation is enacted. *See* Motion of Major League Baseball Players Ass'n for Leave To File Brief Amicus Curiae in Support of Petitioners 2 ("S. 627 provides only that the antitrust laws that apply to all other businesses [will] also 'apply to the business of professional major league baseball.' ").

current climate most of these bargaining cycles end with a work stoppage. Coincidentally, the absence of a current major labor flareup in professional sports makes this a particularly desirable time for the Court to set the rules straight on the proper interplay between the labor and antitrust laws.

Beyond the sports world, respondents ignore the impact the Court of Appeals' decision could have in the hugely important entertainment industry, where talented artists negotiate individual deals within the context of industry-wide bargaining agreements.[11] Finally, they completely overlook the great variety of trades and industries involved in the many cases both in this Court and in the lower courts where the scope of the labor exemption has been at issue.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for certiorari should be granted.

Respectfully submitted,

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[11] *See* Brief for Screen Actors Guild, Inc., *et al.*, as Amici Curiae in Support of Petitioners 3-5. *See also id.* at 6 ("The *Brown* decision would [for example] provide producers with a vehicle for imposing an industry-wide cap on shares of gross profits payable to talent free of possible antitrust liability. The gains to the movie studios from such a device would dwarf the roughly $12 million [realized from respondents' restraint].").

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Nos. 95-137 and 95-388

In the Supreme Court of the United States

OCTOBER TERM, 1995

CHARLES L. WILLIAMS, ET AL., PETITIONERS

v.

NATIONAL BASKETBALL ASSOCIATION, ET AL.

ANTONY BROWN, ET AL., PETITIONERS

v.

PRO FOOTBALL, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND DISTRICT OF COLUMBIA CIRCUITS

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QUESTION PRESENTED

Whether members of a multi-employer bargaining unit may claim the protection of a nonstatutory labor exemption from the federal antitrust laws after a collective bargaining contract has expired and the parties have reached an impasse in negotiations over a new contract.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND DISTRICT OF COLUMBIA CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States has primary responsibility for enforcing the antitrust laws. The United States previously filed a brief as *amicus curiae*, at the petition

stage and at the Court's invitation, in *Powell* v. *National Football League*, No. 89-1421, which raised an issue similar to the one presented in this case. See 95-137 Pet. App. A60-A79 (reprinting *Powell* brief). In the *Williams* case (No. 95-137), the United States filed an *amicus curiae* brief in the court of appeals. 95-137 Pet. App. A41-A47. In the *Brown* case (No. 95-388), the United States filed an *amicus curiae* brief in the court of appeals in support of rehearing. 95-388 Pet. App. 116a-126a.

STATEMENT

1. *Williams* v. *National Basketball Association*, No. 95-137.

a. This is an action brought by the National Basketball Association (NBA) and its member teams against several professional basketball players and their union, seeking a declaratory judgment that various employment practices do not violate the antitrust laws. In 1988, the NBA and the players' union signed a collective bargaining agreement to last until the end of the 1993-1994 professional season. That agreement provided for a draft of eligible college players, a right of first refusal for teams when their restricted free agent players sought to sign with another team, and an overall cap on player salaries. The agreement expired on June 23, 1994, and the players resisted renewal of the college draft, the right of first refusal, and the salary cap. 95-137 Pet. App. A3-A4.

Before the agreement expired, on June 17, 1994, respondents filed their declaratory judgment action. The players counterclaimed, alleging that the draft, right of first refusal, and salary cap violated the Sherman Act. The players requested a preliminary

injunction barring the teams from entering into any contracts until the case was decided on the merits. The district court consolidated the preliminary injunction hearing with the trial on the merits, and, after a one-day trial, granted the employers' request for declaratory relief and dismissed the players' counterclaim. 95-137 Pet. App. A19-A38. The district court concluded that the challenged employment practices were immune from scrutiny under the antitrust laws "as long as the collective bargaining relationship exists" between the teams and the players. *Id.* at A35. It also held, in the alternative, that, even if the practices were subject to antitrust scrutiny, they were lawful, for they were not subject to any *per se* rule of invalidity (*id.* at A36), and they survived analysis under the "rule of reason" (*id.* at A36-A37).

b. The United States Court of Appeals for the Second Circuit affirmed. 95-137 Pet. App. A1-A18. The court held that "antitrust laws do not prohibit employers from bargaining jointly with a union, from implementing their joint proposals in the absence of a [collective bargaining agreement], or from using economic force to obtain agreement to those proposals. What limits on such conduct that exist are found in the labor laws." *Id.* at A17.

The court of appeals noted that multi-employer bargaining "was commonplace and essentially unchallenged—despite the existence of the antitrust laws—long before the passage of the federal labor laws," 95-137 Pet. App. A7, and continues to be a "very common practice throughout the United States," involving "millions of employees and thousands of employers," *id.* at A8. It also remarked that "[o]ne important purpose of such bargaining is to

strengthen the employers' hand by preventing a union from whipsawing employers by shutting them down one-by-one." *Ibid.* According to the court of appeals, "[i]t is the essence of multiemployer bargaining that employers jointly establish and maintain a unified front in dealing with a common union"; therefore, it reasoned, employers must "be allowed to meet and agree upon the terms and conditions of employment to be pursued as a unit and to act as though they were a single employer." *Id.* at A9.

The court emphasized that multi-employer bargaining is plainly legal under federal labor law and has been a "conspicuous feature of collective bargaining since the very formation of unions." 95-137 Pet. App. A12-A13. Since employers may collectively "formulate proposals to unions and insist upon the proposals so long as they bargain in good faith," and since "employers may [unilaterally] implement terms and conditions of employment after good-faith bargaining to an impasse," the court reasoned that multi-employer associations must also be permitted to implement, collectively and unilaterally, the terms of employment that they lawfully present to a union in good faith. *Id.* at A13. The court suggested that a contrary ruling would "prevent employers in all industries from jointly bargaining hard with a common union," for, under the players' theory (as the court perceived it), although employers would still be allowed jointly to make proposals, they "could not maintain the status quo after expiration of the agreement and before bargaining to an impasse, nor could they implement new terms after impasse without fear of antitrust sanctions." *Id.* at A17.

2. *Brown* v. *Pro Football, Inc.*, No. 95-388.

a. This is an antitrust suit brought by professional football players who were placed on "developmental squads" of National Football League (NFL) teams and were paid salaries agreed upon among the team owners. A collective bargaining agreement between the owners and the players' union, which had no provision for such squads, expired in 1987, and the owners and players began negotiations towards a new agreement. In early 1989, the owners adopted a resolution allowing each team to maintain a developmental squad of six first-year players, whose salaries were to be a fixed amount, agreed upon by all the teams. That resolution was a departure from the customary NFL practice of establishing all players' salaries through individual negotiation. 95-388 Pet. App. 6a.

In subsequent bargaining, the owners proposed to pay all developmental squad players a fixed salary of $1,000 per week during the 1989 NFL season. After the players' association rejected the proposal, the team owners declared on June 16, 1989, that the collective bargaining had come to an impasse. The NFL then unilaterally imposed the developmental squad proposal, and the Commissioner of the NFL warned team officials that any team that exceeded the $1,000 salary cap would be subject to disciplinary action. 95-388 Pet. App. 7a.

Several players then brought this action to challenge the developmental squad salary agreement. The owners contended that their agreement to impose uniform salaries was protected from antitrust scrutiny under a nonstatutory labor exemption from the antitrust laws. The district court struck that

defense, ruling that the owners' immunity expired when the prior collective bargaining agreement expired (95-388 Pet. App. 75a-79a), or, at the latest, when the parties reached impasse in their negotiations (*id.* at 80a-86a). The district court subsequently granted summary judgment for the players on liability (*id.* at 93a-115a), and, after a jury trial on damages, awarded them over $30 million and permanently enjoined the owners from collectively setting regular season salaries for any category of players. *Brown* v. *Pro Football, Inc.*, 821 F. Supp. 20 (D.D.C. 1993).

b. A divided panel of the United States Court of Appeals for the District of Columbia Circuit reversed. 95-388 Pet. App. 1a-60a. The majority ruled that the developmental squad salary agreement was legal because "the nonstatutory labor exemption shields from antitrust challenge alleged restraints on competition imposed through the collective bargaining process, so long as the challenged actions are lawful under the labor laws and primarily affect only a labor market organized around a collective bargaining relationship." *Id.* at 10a. The majority reached that conclusion "[a]fter reviewing relevant Supreme Court precedent and the policies underlying both the [National Labor Relations Act (NLRA)] and the Sherman Act," *ibid.*, but it observed that, "[a]lthough the Supreme Court has recognized a nonstatutory labor exemption to the antitrust laws, the scope of the exemption never has been conclusively delineated," and that "the [Supreme] Court's cases in this area mark out only the general boundaries of the doctrine," *id.* at 11a.

The court of appeals rejected the players' argument that the nonstatutory labor exemption "applies only where a union has manifested its consent to a restraint on trade by signing a collective bargaining agreement." 95-388 Pet. App. 14a. Although the majority acknowledged that each of this Court's previous cases involving the nonstatutory labor exemption arose in the context of an antitrust challenge to a union-employer agreement, it observed that "no Supreme Court case expressly limits the exemption in the manner suggested by the [players]." *Id.* at 15a. The court noted that this Court has viewed the nonstatutory labor exemption as a "proper accommodation between the congressional policy favoring *collective bargaining* under the NLRA and the congressional policy favoring free competition in business markets." *Ibid.* (quoting *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975)) (emphasis in court of appeals' opinion). It therefore reasoned that "the juxtaposition of policies giving rise to the exemption focuses on collective bargaining as a *process*, not merely on the product of that process—the collective bargaining agreement." 95-388 Pet. App. 15a. As a result, the majority concluded, "the exemption must be broad enough in scope to shield the entire collective bargaining process established by federal law." *Id.* at 16a.

Emphasizing the "delicate balance of countervailing power that characterizes the [collective bargaining] process," the court stated that "[i]njecting the Sherman Act into the collective bargaining process would disrupt this balance by giving unions a powerful new weapon, one not contemplated by the

federal labor laws." 95-388 Pet. App. 19a-20a. Therefore, the court reasoned, "a proper respect for the national labor policy" requires recognition of the exemption "as a potential shield for all lawful actions taken by either unions or employers pursuant to the collective bargaining process." *Id.* at 20. Conversely, the majority concluded that the policy of the Sherman Act also favors extension of the exemption "where a restraint on competition operates primarily in the labor market," *id.* at 23a, because "the inception of a collective bargaining relationship between employees and employers irrevocably alters the governing legal regime * * * [by] limit[ing] the rights of individual employees to enter into negotiations with their employers," *id.* at 24a. "[O]nce collective bargaining begins," the majority stated, "the Sherman Act paradigm of a perfectly competitive market necessarily is replaced by the NLRA paradigm of organized negotiation—a paradigm that itself contemplates collusive activity on the parts of both employees and employers." *Id.* at 25a.

The court acknowledged that its holding "requires employees involved in a labor dispute to choose whether to invoke the protections of the NLRA or the Sherman Act." 95-388 Pet. App. 30a. The court also observed that, "[i]f employees wish to seek the protections of the Sherman Act, they may forego [*sic*] unionization or even decertify their unions." *Ibid.* But, the court believed, "[i]f [employees] choose to avail themselves of the advantages of the collective bargaining process," they have "many benefits" under the federal labor laws, and, "under the system established by the federal labor laws, employees win concessions not by filing antitrust lawsuits, but with

shrewd bargaining, favorable grievance settlements, victories in arbitration, and, when necessary, by striking." *Id.* at 30a-31a.

c. Circuit Judge Wald dissented. 95-388 Pet. App. 34a-60a. Like the majority, she believed that Supreme Court "[p]recedent is of limited assistance * * * in deciding whether to extend the nonstatutory exemption doctrine to the situation at hand." *Id.* at 45. She also viewed the question as one of "[s]triking the appropriate balance" and "examin[ing] the underlying policies and principles of both labor law and antitrust law." *Ibid.* She argued, however, that the majority's decision "sharply tilts the playing field in employers' favor, and because of that, will erode the vitality of collective bargaining itself." *Id.* at 34a.

Starting from the proposition that, "[a]bsent special statutory or judge-made exemption, a multi-employer agreement unilaterally imposing uniform industry-wide terms of employment * * * runs afoul of the antitrust laws" (95-388 Pet. App. 35a), Judge Wald concluded that the nonstatutory labor exemption does not shield from antitrust scrutiny such terms when they are unilaterally imposed after the parties have reached impasse in the collective bargaining process. *Id.* at 59a (citation omitted). She stressed that, while employers may not unilaterally impose terms of employment during collective bargaining, "after impasse, the employer is free [under federal labor law] to unilaterally impose terms reasonably encompassed in bargaining proposals already rejected by the union, because at that point the employer has exhausted its statutory duty to bargain." *Id.* at 52a (citation omitted). "[U]nilaterally-imposed terms," she suggested, "are

inescapably *nontactical* in nature—they are simply the way the employer decides to run his business in the absence of any bargaining agreement. They are not bargaining tactics but the end-product of an unsuccessful bargaining process[.] * * * [They] are a substitute for an agreement, not a means of reaching one." *Id.* at 54a. She therefore argued that, after impasse, the operation of the antitrust laws does not frustrate the collective bargaining process, and that, "when an agreement is no longer in sight or even being sought[,] immunity from antitrust liability for terms employers unilaterally impose should terminate." *Id.* at 60a.

d. The court of appeals denied rehearing and rehearing en banc, with Judge Wald dissenting. 95-388 Pet. App. 61a-63a. Circuit Judge Tatel filed a concurring statement that "[t]he issues have been fully engaged and developed by the majority and dissenting opinions," and that "Supreme Court review is essential to the resolution of these issues." *Id.* at 63a.

DISCUSSION

1. In our *amicus curiae* brief in *Powell* v. *National Football League*, No. 89-1421, we expressed the view that, although employers and employees may (in some circumstances) claim immunity from the antitrust laws for the provisions of a collective bargaining agreement during the term of the agreement and the period of collective bargaining after its expiration, the employers' immunity terminates "when the parties have reached an impasse in their negotiation over a new collective bargaining agreement * * * [and] the employer has made a unilateral, post-impasse change in the provision at issue." 95-137 Pet. App. A76-A77. That continues to

be the position of the United States. We therefore disagree with the decisions of both courts of appeals in these cases.

In *Powell*, we suggested that the Court grant review of the Eighth Circuit's decision, even though, at the time, there was no conflict among the circuits on the precise issue presented, and indeed the question was then one of first impression. Since *Powell*, no conflict in the circuits has developed, and the D.C. Circuit and the Second Circuit have agreed with the Eighth Circuit that conditions of employment unilaterally imposed on unionized employees by multi-employer associations may not be challenged under the antitrust laws. Nevertheless, we believe that the Court should grant review at this time, for the courts of appeals' expansive formulation of the labor exemption is wrong as a matter of law, and may do serious harm to the nation's antitrust and labor policies if not reversed.[1] Their rulings unnecessarily force employees to choose between two sets of statutory rights granted by Congress.[2]

While the lower courts' formulation of the non-statutory labor exemption was influenced by the desire to promote labor peace, the six years since the Eighth Circuit's decision in *Powell* have in

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[1] The National Labor Relations Board concurs in this view and in our submission that review by this Court is warranted.

[2] The joint venture characteristics of sports leagues may justify analysis under the rule of reason of unilateral league restraints on wage competition, even though those restraints would be illegal *per se* in different industries. See *McNeil* v. *NFL*, 790 F. Supp. 871, 896-897 (D. Minn. 1992). That is a matter separate from any labor exemption, however, and is not before the Court.

fact witnessed extraordinary turbulence in labor-management relations in every major professional league sport.[3] While a broad labor exemption from the antitrust laws for employers was certainly not the sole cause of that distress in labor-management relations, we believe that it was a significant contributing cause. Moreover, as we stated in *Powell*, the potential for mischief is quite broad, because the courts of appeals' expansive interpretation of the labor exemption extends well beyond professional sports. It affects the entertainment industry, which has an economic structure similar to that of professional sports, characterized by multi-employer bargaining units. See *American Broadcasting Cos.* v. *Writers Guild of America, West, Inc.*, 437 U.S. 411, 413-414 (1978). It also conceivably affects many other collective bargaining relationships involving multi-employer associations, in employment sectors as diverse as the electrical and construction trades. As the Second Circuit noted, multi-employer labor relationships involve "millions of employees and thousands of employers." 95-137 Pet. App. A8.

The *Brown* case presents the issue for review in a clear fashion, for it is not disputed that the parties to that case reached an impasse in negotiations, or that the employers unilaterally imposed a wage arrangement, agreed upon among themselves, after the impasse. Basically the same issue is presented in *Williams*, but, in several respects, *Brown* is a more suitable vehicle for review. First, the parties in

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[3] The business of professional baseball, which is not subject to the antitrust laws (*Flood* v. *Kuhn*, 407 U.S. 258 (1972)), has continued its history of troubled labor-management relations.

Williams disagree whether an impasse was reached. The district court made no finding on that point; under the legal standard that it adopted (which the Second Circuit upheld), impasse has no significance, and the purported immunity extends as long as the employers and the unionized employees have a collective bargaining relationship. See 95-137 Pet. App. A34. Second, in *Williams*, the district court adjudicated the merits of the antitrust claim and concluded that the challenged practices did not violate the Sherman Act. *Id.* at A35-A37. In *Brown*, by contrast, the district court ruled that the developmental squad arrangement did violate the Sherman Act. That ruling on the merits was not addressed on appeal, and so a decision on the immunity issue is necessary to the final resolution of the case. Third, in *Brown*, the owners imposed a new term of employment not contained in any prior labor contract, whereas in *Williams* the conditions alleged to violate the antitrust laws were contained in a previous collective bargaining agreement. The owners sought to maintain the *status quo*, which they were obliged to do under federal labor law in the absence of an impasse. See *id.* at A3, A7. We therefore suggest that the Court grant the petition in *Brown* and hold the *Williams* petition pending its decision. Alternatively, the Court could grant both petitions and consolidate the cases for argument.

2. The immunity for unilateral employer group action adopted by the courts of appeals is not a logical outgrowth of the nonstatutory labor exemption recognized by this Court. As this Court carefully summarized the law in *Connell Construction Co.*, "a proper accommodation between the congressional

policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that *some union-employer agreements* be accorded a limited nonstatutory exemption from antitrust sanctions." 421 U.S. at 622 (emphasis added). The Court's limitation of its formulation of the exemption to "union-employer agreements" was not inadvertent. Well before enactment of the NLRA, concerted action by a group of employers to control the labor market was recognized as unlawful under the antitrust laws. See *Anderson* v. *Shipowners Ass'n*, 272 U.S. 359 (1926); see also 95-388 Pet. App. 37a (Judge Wald's dissent, collecting lower-court cases). The nonstatutory exemption, an exception to that rule, is necessary to ensure that collective bargaining agreements can be given effect. As Judge Wald observed, "the collective bargaining scheme established by the national labor laws would be mortally undercut if collective bargaining agreements were subject to collateral attack under the antitrust laws as 'combinations in restraint of trade.'" *Id.* at 43a. Since multi-employer bargaining is permitted by federal labor law, collective bargaining agreements entered into by multi-employer units and employees are generally not subject to antitrust challenge. See *United Mine Workers* v. *Pennington*, 381 U.S. 657, 661-664 (1965) ("a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws").

The courts of appeals did not ground the nonstatutory labor exemption in collective bargaining *agreements*, however. Rather, they fashioned a far broader implied antitrust immunity for employers,

based on the *process* of collective bargaining contemplated by the NLRA. In doing so, they strayed from the proper basis of the exemption.

The NLRA does primarily regulate the process of collective bargaining. Under the labor laws, however, that process is not an end in itself, but a means to an end. It is a "process that look[s] to the ordering of the parties' industrial relationship through the formation of a contract." *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 485 (1960). Properly limited, the nonstatutory labor exemption is simply a common sense recognition of the fact that the ultimate purpose of the labor laws would be frustrated if such labor contracts, once reached, were declared invalid under the antitrust laws. See *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 711-712 (1965) (opinion of Goldberg, J.).

The courts of appeals nonetheless suggested that unilateral multi-employer agreements imposed on unionized employees should be immunized because applying the antitrust laws would disrupt "the delicate balance of countervailing power * * * by giving unions a powerful new weapon, one not contemplated by the federal labor laws." 95-388 Pet. App. 19a-20a; see 95-137 Pet. App. A7-A9, A13-A14. That rationale is flawed, for the labor laws themselves are not concerned with any *particular* balance of power between unions and employers. See *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. at 490. Indeed, this Court has stated that the National Labor Relations Board may not attempt to "regulate the choice of economic weapons that may be used as part of collective bargaining." *Id.* at 490-498. But that is essentially what the courts of appeals have done in

these cases; they have denied organized employees the benefit of an antitrust cause of action because they perceive such a lawsuit to be too powerful an economic weapon.

Neither the text nor the history of the NLRA suggests that Congress intended to deprive unionized workers of the antitrust laws' protection from employer-imposed restraints on competition in the labor market. To the contrary, the predominant thrust of the NLRA was to expand the protection afforded employees. And while the labor laws do promote and encourage the process of collective bargaining, there is insufficient support in the policy of the NLRA for the courts of appeals' conclusion that Congress intended to force employees to choose between their rights under federal labor law and their rights under federal antitrust law.

3. Both the antitrust laws and the labor laws are expressions of fundamental national policy, and courts have no mandate to favor one over the other. "When there are two acts upon the same subject, the rule is to give effect to both if possible." *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939). Consistent with that principle, and also with the familiar principle that exemptions to the Sherman Act are to be narrowly construed, *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 231 (1979), an implied exemption to the antitrust laws should be recognized only when it is "necessary to make the [conflicting statutory scheme] work, and even then only to the minimum extent necessary." *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357

(1963).[4] The necessary accommodation of labor and antitrust policies does not call for the operation of a less stringent test; the accommodation must be firmly grounded in what "labor policy requires" (see *Connell*, 421 U.S. at 622), and should override the antitrust laws only to the extent there is a "conflict" with such a requirement (*Pennington*, 381 U.S. at 666).

In the cases at issue, there is no conflict requiring a broad exemption. After the expiration of a collective bargaining agreement but before impasse, employers are constrained by federal labor law in the terms and conditions of employment that they may impose, and must generally maintain the terms of employment established by an expired labor contract. See *NLRB* v. *Katz*, 369 U.S. 736, 742-743 (1962). During that period, therefore, an exemption from the antitrust laws for the terms of an expired labor agreement is necessary, for employers would otherwise be forced to chose between committing an unfair labor practice and running the risk of an antitrust violation.

If, however, the parties reach an impasse, many of the constraints imposed on them by labor law are removed, and they become free to use additional

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[4] The implied labor antitrust immunity can also be viewed as a form of implied repeal. It is "well established" that implied repeals are "not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system. Repeal is to be regarded as implied only if necessary to make the [subsequent law] work, and even then only to the minimum extent necessary." *National Gerimedical Hosp. & Gerontology Ctr.* v. *Blue Cross*, 452 U.S. 378, 388-389 (1981) (citations and internal quotation marks omitted).

economic and legal tools to persuade the other side to reconsider its position. For example, after impasse, labor law permits employers to make unilateral changes in the terms of employment, if those changes have been offered as good faith proposals during the bargaining process. *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 454 U.S 404, 415 n.9 (1982). Moreover, members of a multi-employer bargaining unit are free to negotiate individual arrangements on an interim basis with the union after impasse. *Ibid.* Similarly, after impasse, employees become more likely to use various legal and economic weapons at their disposal, including the right to strike, and there is no reason to believe that Congress intended to deprive employees of the particularly forceful weapon of an antitrust suit. Since the labor laws authorize and contemplate the greater use of economic weapons after impasse, operation of the antitrust laws would not cause a conflict with any party's obligations under federal labor law.

4. As we noted in our brief in *Powell*, the precise point of impasse is not always easily identified, even in retrospect. 95-137 Pet. App. A76-A77. Furthermore, federal labor law, which promotes bargaining, prefers caution in declaration of an impasse to a premature conclusion that further bargaining is futile. Thus, there may be a justification in labor policy for the implied immunity to endure for a reasonable time after impasse—for example, so that employers can ascertain upon advice of counsel whether impasse has in fact occurred and whether the restraint in question would be likely to violate the antitrust laws, and can adjust their business operations to eliminate the proposed restraint. Immunity

should not continue, however, once the employers, after impasse, have jointly elected unilaterally to impose their proposed terms. Such unilateral action, which would be an unfair labor practice if taken prior to impasse, would demonstrate the employers' assumption that impasse has indeed occurred, and should therefore free employees to proceed under the antitrust laws.

CONCLUSION

The petition for a writ of certiorari in No. 95-388 should be granted.

Respectfully submitted.

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OCTOBER 1995

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No. 95-388

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,

Petitioners,

vs.

PRO FOOTBALL, INC. d/b/a WASHINGTON REDSKINS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR THE SCREEN ACTORS GUILD, INC., AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, DIRECTORS GUILD OF AMERICA AND WRITERS GUILD OF AMERICA, WEST, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2(b) of the Rules of this Court, the Screen Actors Guild, Inc. ("SAG"), American Federation of Television and Radio Artists ("AFTRA"), Directors Guild of America ("DGA") and Writers Guild of America, West, Inc. ("WGA"), hereby move for leave to file the attached brief *amici curiae*. Petitioners have granted but Respondents have

refused consent for SAG, AFTRA, DGA and WGA to file their brief *amici curiae* in this case.[1]

The question of the existence and content of a new non-statutory exemption from the antitrust laws is a crucial issue in antitrust and labor law today. The interests of SAG and AFTRA, the unions representing performers employed in the production of theatrical motion pictures, television and radio programs, and television and radio commercials, DGA, the union representing directors and others employed in such productions, and WGA, the union representing writers employed in entertainment and non-fiction productions, as *amici*, flow from the signal importance that the decision below has to employees in the entertainment industry. As principal representatives of large bargaining units dealing with employers engaged in coalition bargaining, SAG, AFTRA, DGA and WGA have a broad and important perspective on the need for Supreme Court review of the decision below.

The Circuit Court's decision--if allowed to stand--will have devastating effects on labor relations throughout the entertainment industry, consequences likely to exceed substantially those which will ensue in the world of sports.

The Petition for Certiorari as well as the *Amicus Curiae* filings of the United States in *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), and in support of the petition for rehearing in the Court of Appeals in this case (95-388 Pet. App. E), each correctly observe that the consequences of the Court of Appeals' decision will not be specific to sports but will extend to other areas of the economy, particularly entertainment. These filings do not provide specifics. Because of their particular perspective, SAG, AFTRA, DGA and WGA can elaborate on: the structure of labor relations in the entertainment industry; historical instances of the willingness of entertainment enterprises to engage in

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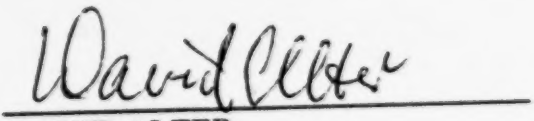
[1] Attached hereto is the written consent of the Petitioners to the submission of this brief.

collusion in their markets for talent; and the manner in which such collusion would likely be fostered by the Court of Appeals' decision in *Brown*.

Because of their particular perspective, their interest in a just resolution of the case, and the singular importance of the issue presented, SAG, AFTRA, DGA and WGA request leave to file the attached brief as *amici curiae*.

Respectfully submitted,



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November 10, 1995

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James Aley, Where the Jobs Are; The U.S. Has Added Millions Since 1990--Some in Surprising Places.Look For the Best Ones in Industries Where Knowledge Counts, *The Time Magazine Co. Fortune*, Sept. 18, 1995, at 53 4

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BRIEF OF THE SCREEN ACTORS GUILD, INC., THE AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, DIRECTORS GUILD OF AMERICA AND WRITERS GUILD OF AMERICA, WEST, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This Brief, in support of the Petition for Writ of Certiorari, is submitted in accordance with Rule 37 of the Rules of this Court. The Screen Actors Guild, Inc., ("SAG"), American Federation of Radio and Television Artists, ("AFTRA"), Directors Guild of America ("DGA") and Writers Guild of America, West, Inc., ("WGA") have obtained and file herewith the written consent of the Petitioners to the submission

of this brief. Respondents, however, have refused consent. Accordingly, pursuant to Rule 37.2(b) of the Rules of this Court, SAG, AFTRA, DGA and WGA are filing herewith a motion for leave to file this brief as *amici curiae*.

INTEREST OF *AMICI CURIAE*

The question of the existence and content of a new non-statutory exemption from the antitrust laws is a crucial issue in antitrust and labor law today. The interests of SAG and AFTRA, the unions representing performers employed in the production of theatrical motion pictures, television and radio programs, and television and radio commercials, DGA, the union representing directors and others employed in such productions, and WGA, the union representing writers employed in entertainment and non-fiction productions, as *amici*, flow from the signal importance that the decision below has to employees in the entertainment industry. As principal representatives of large bargaining units dealing with employers engaged in coalition bargaining, SAG, AFTRA, DGA and WGA have a broad and important perspective on the need for Supreme Court review of the decision below.

ARGUMENT

The Petition for Certiorari persuasively delineates the profoundly harmful consequences for labor relations in professional sports which have already ensued from the decision in *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), and which will be compounded immeasurably by the decision of the Court of Appeals in this case. 95-388 Pet. at 26 *et. seq*. The Petition correctly observes that the effects of these decisions are not specific to sports but extend to other industries, most notably the entertainment industry. 95-388 Pet. at 26. The United States filed an *amicus curiae* brief in *Powell* in which it observed, also without elaboration, that the decision's "potential for mischief" extended, in particular, to the "entertainment industry generally, which has an economic structure similar to professional sports." Brief for United States as Amicus Curiae in *Powell* 18-19. Based on perspectives gained through their direct

experience representing employees in the primary areas of the entertainment industry, *amici* can readily confirm that the observations of Petitioners and the United States are well-founded.

As in professional sports, the Circuit Court's decision will discourage resolution of labor disputes in the entertainment industry through collective bargaining agreements. First, it is likely to lead to more strikes and lockouts. For entertainment employers, it will create powerful incentives to use collective bargaining as a mechanism for collectively imposing employment terms that severely restrain competition in their markets for performers, writers, directors and other employees without fear of antitrust violations. For employees, it may create incentives to seek union decertification and/or, at the very least, to withdraw from hitherto salutary multi-employer bargaining relationships. Second, simply because a union strikes over an onerous term, does not suggest that the strike will be effective. Unsuccessful strikes create labor unrest.

The Circuit Court's decision--if allowed to stand--will have devastating effects on labor relations throughout the entertainment industry likely to exceed substantially those which will ensue in the world of sports. This is primarily because the entertainment industry, both in terms of numbers of employees and in terms of revenue, is significantly larger than professional sports. Whereas professional sports accounts for roughly $5 billion in spectator revenues annually, entertainment (even narrowly defined as spectator entertainment including *e.g.* film-making, broadcasting, music, live theater, and other artistic performances) accounts for some $100 billion annually.[1] Since 1990, the motion picture industry alone has created more jobs than all of America's motor vehicles

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[1] *See*, Harold Vogel, *Entertainment Industry Economics* Cambridge University Press (3rd Ed. 1994).

and parts manufacturers, pharmaceutical companies, and the hotel industry combined.[2]

The entertainment industry, like the sports industry, is the province of employer conglomerates. There are now four established television networks, six major recording companies, seven film studios, and eight large book publishers. While there are small, independent firms engaged in producing movies and other entertainment products, more and more of the majors are being welded together into giant multimedia conglomerates.

Entertainers comprise one of the most extensively unionized occupations in the American economy. Industry-wide bargaining is virtually universal in most segments of the entertainment industry. Though the key arms of entertainer unionism emerged before the 1935 enactment of the National Labor Relations Act, the NLRA governs labor relations in the entertainment industry. Until now, the premise of federal labor legislation has been that employees have a better chance of securing a fair deal from their employers if they bargain collectively rather than individually. The holding that employees lose the right to sell their talents in a competitive market merely by exercising the right to pursue collective bargaining totally undermines this premise for employees in the entertainment industry.

The structure of labor relations in entertainment closely parallels that in sports. In both contexts, (1) the work force is heavily unionized; (2) industry-wide bargaining is almost universal; and (3) the employers in the entertainment industry collectively wield monopsony power.

Additionally, the entertainment and sports industries are the two areas of the economy where the accepted industry

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[2] James Aley, *Where the Jobs Are; The U.S. Has Added Millions Since 1990--Some in Surprising Places. Look For the Best Ones in Industries Where Knowledge Counts, The Time Inc. Magazine Co. Fortune,* Sept. 18, 1995, at 53.

practice is for the collective bargaining agreement to prescribe only a minimum framework of employment terms; because of the vast differences in the available roles for performers and in the skill required to fill such roles (i.e., star performers, featured performers, principal performers, background performers and extras), compensation terms are typically established in these industries through individual negotiations in which employees are routinely represented by "agents." *See H.A. Artists v. Actors' Equity Ass'n*, 451 U.S. 704, 707 (1981). Individual Screen and TV Writers also routinely negotiate "overscale compensation" rates which exceed the minimums in WGA's collective bargaining agreements.

Collusion in these supposed individual negotiations can produce huge economic gains for the employers and cause employees to suffer substantial economic harm. To maximize profits, employers will obviously be tempted to restrain competition through collusion in the talent market, if they can do so with antitrust immunity.

The history of labor relations in the entertainment industry provides tangible illustrations of the willingness of entertainment employers to establish industry-wide practices. Circumstances surrounding the birth of the Screen Actors Guild in the 1930's provide a leading example. During the Depression, the movie studios agreed among themselves through their own organization, the Motion Picture Producers and Distributors Association, to institute a temporary 50 percent salary cut in current salary rates; a salary cap of $100,000 a year on the amount that could be paid to any performer, and a "right of first refusal" on any offers made to their contract players once the seven-year terms of their contracts expired. The prospect of such a change in studio-performer relations galvanized organization of the Screen Actors Guild as an independent union.[3]

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[3] Another example is the Waldorf-Astoria Agreement of the members of the Motion Picture Association of America ("MPAA") in 1947 not to hire anyone who declined to disavow communist associations. The agreement, a classic group boycott, imposed a fifteen-year blacklist on many leading

(Footnote continued)

The Screen Actors Guild and other entertainment industry unions have, until now, succeeded--by withholding their agreement--in blocking introduction of industry-wide salary caps, rights of first refusal and other similar employment terms which would hinder individual performers from realizing the full economic returns on their talents and appeal. The Court of Appeals' decision in *Brown* will enable employers in the entertainment industry to act without union agreement in imposing employment terms such as these which substantially eliminate competition in their markets for labor talent.

As stated above, the entertainment industry is many times larger than the sports industry and the potential for monopsony gains realizable through collusion is accordingly larger as well. A salient example of what might well occur involves the matter of sharing of gross profits, now a key feature of star performers compensation and an emerging factor for high profile screenwriters.[4] The *Brown* decision would provide producers with a vehicle for imposing an industry-wide cap on shares of gross profits payable to talent free of possible antitrust liability. The gains to the movie studios from such a device would dwarf the roughly $12 million apparently saved by the NFL Clubs through the Developmental Squad salary fix at issue in *Brown*.

Another example is the matter of residual rights, the talent's share of the revenues derived by the movie studio or other producer when the film or television product is reused in

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screen-writers of the time. The scheme could not plausibly have been effectuated other than through collective action of all members of the group.

A recent holding by the Second Circuit cited the *Brown* decision as support to immunize from antitrust challenge an agreement among sports clubs to blacklist a particular employee. *Caldwell v. American Basketball Ass'n*, ___ F.3d ___, 1995 WL 559522 (2d Cir. September 21, 1995).

[4] Based on his individual contract terms, Tom Hanks reportedly realized some $40 million as a share of gross profits on *Forrest Gump* through the end of 1994 and Jack Nicholson similarly made roughly $70 million from *Batman*.

a setting other than the one for which it was originally produced. The emergence of new technologies, beginning with television and now including video, cable, interactive multimedia, and also the sale by the studio of foreign rights continue to increase the dollar value of residual rights. As a consequence, the size of the talents' share in the value of residual rights has been the most contentious issue in Hollywood labor relations for decades and it remains so today. Notably, the right to share in TV residual revenues was first won for film actors by SAG through a lengthy strike in 1960 led by former President Ronald Reagan when he was president of the SAG, and the same year for screen writers in their strike. *Brown* would allow the movie studios collectively, without fear of antitrust liability, to limit or eliminate the share of residual rights payable to talent.

One key difference between sports and entertainment highlights entertainment employees' particular concern with the sports-industry generated version of the exemption at issue in this case. In the world of sports, there is on the surface a plausible justification for some degree of employer collaboration--a justification not shared in entertainment. Sports leagues claim to need common rules and assert those rules must be focused on generating competitive balance to make the product attractive. Whatever the weight of these arguments in sports,[5] they have no place whatever in the context of entertainment where the employers are not similarly engaged in leagues.

The consequence of the hands-off approach taken by the Court of Appeals in *Brown* is to give insulation from antitrust challenge to the entertainment world, which is far larger than the world of sports and which moreover presents none of the intrinsic justifications for a degree of employer collaboration.

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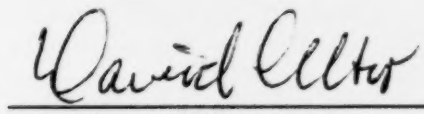
[5] In the sports context, such arguments may justify a particular labor-market restraint under the "rule of reason", *see, e.g., NCAA v. Board of Regents*, 468 U.S. 85 (1984); they do not in any event warrant invocation of an antitrust exemption.

CONCLUSION

For the reasons stated herein, the Screen Actors Guild, Inc., American Federation of Television and Radio Artists, Directors Guild of America and Writers Guild of America, West, Inc., as *amici*, respectfully submit that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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November 10, 1995

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Major League Baseball Players Association ("MLBPA") has for many years been recognized as the exclusive bargaining representative for all major league baseball players. Because respondents here have refused to consent to the MLBPA's filing of a brief *amicus curiae*, the MLBPA seeks leave to file the following brief *amicus curiae* in support of the petition for *certiorari* in the above-captioned case. The grounds for this motion are as follows:

1. At present, major league baseball's reserve system enjoys a unique exemption from the federal antitrust laws by virtue of this Court's decision in *Federal Baseball Club v. National League*, 259 U.S. 200 (1922). *Federal Baseball Club* was reaffirmed in *Flood v. Kuhn*, 407 U.S. 258, 282 (1972).

2. Since *Flood* was decided, courts have considered the breadth of professional baseball's antitrust exemption. *See Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993); *Butterworth v. National League of Professional Baseball Clubs*, 644 So. 2d 1021 (S. Ct. Fla. 1994). And, in the interest of its members, the MLBPA has petitioned Congress to enact legislation making plain that the antitrust laws apply to professional baseball. In August 1995, the Senate Judiciary Committee voted to approve the The Major League Baseball Antitrust Reform Act of 1995, S. 627. That bill, which would remove professional baseball's special exemption from the antitrust laws, will be placed on the calendar of the Senate as soon as the Committee's report is filed. A companion bill is pending consideration before the House Judiciary Committee. A similar bill passed the House Judiciary Committee in September 1994, but was not acted upon by the full House before that Congress ended its session.

3. In light of the MLBPA's ongoing efforts with respect to professional baseball's antitrust exemption, the issues raised by the petition for *certiorari* are of critical importance to the MLBPA. S. 627 provides only that the antitrust laws that apply to all other businesses also "apply to the business of professional major league baseball." *See* section 27(a). And, the majority opinion in *Brown v. Pro Football, Inc.*, 50 F.3d 1041 (D.C. Cir. 1995) ("*Brown*"), holds that professional athletes forfeit their rights under the antitrust laws if they are represented by an exclusive bargaining representative.

4. In addition, as the exclusive bargaining representative in the only professional sport where the employers assert that the antitrust laws do not apply, the MLBPA is uniquely situated to address the important questions raised by the petition for *certiorari*. As a result of the decision in *Flood*, the MLBPA has extensive knowledge of labor relations in the professional sports context when employers do not feel in any way restrained by the antitrust laws. Not coincidentally, major league baseball has

suffered eight successive lockouts and/or strikes. The bargaining parties have not concluded a new collective bargaining agreement without a work stoppage since 1970, and baseball is the only professional sport to have lost its post-season championship, the World Series, to labor-management strife.

5. In our brief, we show that the rule adopted in *Brown* will have significant destabilizing effects on labor relations in the sports and entertainment industries. We also show that the *Brown* court decided an important and recurring question of federal law—the proper harmonization of federal labor policy and federal antitrust policy—in a manner that departs from principles well established by this Court. We urge in the accompanying brief that this Court grant *certiorari* to settle the law in this area.

Wherefore, the MLBPA respectfully requests that its motion for leave to file a brief *amicus curiae* in support of petitioners be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-388

ANTHONY BROWN, *et al.*,
Petitioners,

v.

PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief *amicus curiae* in support of petitioner is filed by the Major League Baseball Players Association ("MLBPA"), the exclusive bargaining representative for all major league baseball players. The interest of the MLBPA is set out in the accompanying motion for leave to file brief *amicus curiae*.

REASONS FOR GRANTING THE WRIT

The rule adopted by the court below and by the Second Circuit Court of Appeals, *see* note 1 *infra*, will have significant destabilizing effects on the conduct of labor relations in the sports and entertainment industries. That rule marks a profound departure from the principles crafted

by this Court. Rather than harmonizing the federal labor laws and the federal antitrust laws as it was required to do, the court below enlarged the nonstatutory labor exemption from the antitrust laws beyond the confines established by this Court. The lower court's rule would disserve both statutory schemes: Employees would be deterred from exercising rights established by the National Labor Relations Act ("NLRA") for the protection of employees; and unreasonable anticompetitive conduct by groups of employers, which would otherwise violate the federal antitrust laws, would be shielded from the prohibitions of those laws. This case merits plenary consideration by this Court.

A. The respondents, the Clubs of the National Football League ("NFL"), agreed among themselves to fix the salaries of petitioners, football players on the Clubs' developmental squads, at $1000 per week. Absent this anticompetitive agreement, the developmental squad players would each be free individually to negotiate compensation with an NFL Club, and the amount of that compensation would be determined by the forces of the free market.

The District Court held that the Clubs' agreement was "significantly anticompetitive in its effect" and lacked any procompetitive justification. Pet. App. 110a-114a. The court rejected respondents' reliance on the nonstatutory labor exemption from the antitrust laws, because (i) there was no collective bargaining agreement between the Clubs and petitioners' union, the NFL Players Association; (ii) the parties had reached impasse on the issue of petitioners' compensation; and (iii) the NFL Players Association had never agreed to fixed salaries for petitioners. *Id.* at 72a-80a, 86a-90a.

A divided panel of the Court of Appeals reversed. *Brown v. Pro Football, Inc.*, 50 F.3d 1041 (D.C. Cir. 1995) ("*Brown*"). For the majority, Chief Judge Edwards held that "the nonstatutory labor exemption

shields from antitrust challenge alleged restraints on competition imposed through the collective bargaining process, so long as the challenged actions are lawful under the labor laws and primarily affect only a labor market organized around a collective bargaining relationship." *Id.* at 10a.[1] In dissent, Judge Wald maintained that the majority's holding constitutes an unwarranted expansion of this Court's limited nonstatutory labor exemption that will undermine federal labor and antitrust laws. App. 48a-49a.

B. There are two compelling reasons that the petition for *certiorari* in this case should be granted: First, *Brown* and *Williams*, if they stand, will have the effect of significantly destabilizing labor relations in the sports and entertainment industries and will undermine, rather than serve, the interests that the federal labor laws are intended to protect. Second, *Brown* and *Williams* resolve an important and recurring question regarding the harmonization of the federal labor and antitrust laws in a manner that departs from the principles established by this Court's decisions.

1. *Brown* holds that members of a multiemployer group who agree to engage in conduct in their labor market that violates the antitrust laws are exempt from those laws *solely* because their employees exercise the right under the NLRA to be represented by a union. Such employees may gain the right to assert antitrust claims against the multiemployer group only if the union ceases to be the employees' exclusive collective bargaining representative. *See Brown*, 50 F.3d at 1057 ("if employees wish to seek the protections of the Sherman Act, they may forego unionization or . . . decertify their unions"). The practical effect of this decision is to de-

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[1] In so doing, the majority followed a recent decision of the Court of Appeals for the Second Circuit, *Williams v. National Basketball Ass'n*, 45 F.3d 684 (2d Cir. 1995) ("*Williams*").

stabilize labor relations in the sports and entertainment industries.

In professional football, as in most other sports and entertainment industries, the union has determined that the best way to maximize union members' economic interests is to preserve the right of each member individually to negotiate and contract for his own salary so that each member can exert leverage based on his unique skills and personal contributions. *See J.I. Case v. National Labor Relations Board*, 321 U.S. 332, 338 (1944) ("Of course, where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours *or expressly to leave certain areas open to individual bargaining*") (emphasis added). Prior to the decisions in *Brown* and *Williams*, sports and entertainment unions and their individual members operated under the assumption that each individual's right to negotiate and agree to compensation with an employer was protected from unreasonably anticompetitive employer conduct by the antitrust laws.

If *Brown* and *Williams* stand, that assumption becomes incorrect. At critical moments in the collective bargaining relationship—such as the crucial junctures where a collective bargaining agreement expires and where an impasse in bargaining is reached—unions and union members would have to weigh whether the members' interests would be best served by terminating the union's status as the exclusive bargaining representative so that members could assert their individual rights under the antitrust laws. Unions and employers would bargain in an atmosphere where at any moment the bargaining relationship could disappear.

Far from being a remote possibility, this scenario has already occurred. Informed by the Court of Appeals for the Eighth Circuit that their antitrust rights had been extinguished, *see Powell v. NFL*, 930 F.2d 1293 (8th

Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), NFL players decertified their union for six full seasons. *See* App. 30a, 48a. And, after *Williams* was decided, professional basketball experienced its first work stoppage when the NBA locked out the players in response to a petition for decertification of the exclusive bargaining representative. *See* Pet. 28 & n.12.

This Court should take this case to resolve whether the significant destabilizing effect of *Brown* and *Williams* is the result that Congress intended.

2. Under the decision below, employees in the sports and entertainment industries are required to choose between the protections of the system of labor relations established by the NLRA or the protections against unreasonable anticompetitive restraints provided by the antitrust laws. Under principles established by this Court, however, employees are not required to make such an election. Instead of harmonizing the NLRA and the antitrust laws, the *Brown* court's rule unduly expands the nonstatutory labor exemption, thereby undermining both statutory schemes.

a. By providing that employees who exercise their statutory right under the NLRA to choose a bargaining representative automatically forfeit their right to the protections of the antitrust laws in the labor market, the rule adopted below would discourage employees from using the very processes that the NLRA is designed to foster.[2]

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[2] As this Court stated in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753-54 (1985) (quoting from section 1 of the NLRA), the NLRA is intended to "encourage the practice and procedure of collective bargaining and . . . protect [] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection." *See also e.g., American*

This Court has often held that state laws may not burden the NLRA right of self-organization by providing a benefit or entitlement to nonunionized employees that is not provided to unionized employees: "It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).[3]

Similarly, this Court has observed that federal laws providing for minimum employment standards apply without regard to whether employees are or become unionized: "Nor has Congress *ever* seen fit to exclude unionized workers and employers from laws establishing federal minimum employment standards." *Metropolitan Life*, 471 U.S. at 755 (emphasis added). *See also Livadas*, 114 S. Ct. at 2081 ("[A]s we observed in *Metropolitan Life*, the widespread practice in Congress and in state legislatures has assumed the contrary, bestowing basic employment guarantees and protections on individual employees without singling out members of labor unions (or those represented by them) for disability.").

There is no principled basis for singling out the antitrust laws for treatment different from that received by federal safety and health, pension, and antidiscrimination laws, as the *Brown* court has done. Absent some express statement by Congress, employees do not lose the benefit of the statutory rights that they have as individuals sim-

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Hospital Ass'n v. National Labor Relations Board, 449 U.S. 606, 609 (1991) ("The central purpose of the Act was to protect and facilitate employees' opportunity to organize unions to represent them in collective-bargaining negotiations.").

[3] *Accord Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19-22 (1987); *Livadas v. Bradshaw*, 114 S. Ct. 2068, 2081-82 (1994).

ply because they are represented by a union. The antitrust laws contain no such exclusion.[4]

b. There is no express provision in the labor laws or the antitrust laws that exempts the challenged actions of the NFL Clubs from the application of the antitrust laws.[5] Nevertheless, the *Brown* court decided that the NFL Clubs' actions are protected from antitrust scrutiny by virtue of the nonstatutory labor exemption to the antitrust laws. In so deciding, *Brown* would enlarge the nonstatutory labor exemption well beyond the confines established by this Court's decisions.

This Court created the nonstatutory exemption to address a particular and defined area of tension between labor law and antitrust law. That tension arises when a union—in furtherance of the legitimate interests of its members—enters into an agreement with a group of

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[4] On this point, we cannot improve upon the words of the United States in its brief urging the Supreme Court to grant *certiorari* in *Powell*:

> Neither the text nor the history of the NLRA fairly suggests that Congress implicitly intended broadly to deprive unionized workers of the antitrust laws' protection from employer-imposed restraints on competition in the labor market. The text of the NLRA does not mention the antitrust laws, and the legislative history demonstrates no intent to restrict the preexisting rights of workers as the price of participation in a collective bargaining relationship—rights that presumably would continue to exist for other, non-unionized workers. To the contrary, the predominant thrust of the statute (and of related enactments such as the *Norris-LaGuardia* Act) is to expand the protection afforded employees.

Brief for the United States as *Amicus Curiae* at 13-14 (Dec. 1990).

[5] The labor laws and the antitrust laws do contain express provisions exempting certain unilateral *union* activities from the reach of the antitrust laws. *See* 15 U.S.C. § 17; 29 U.S.C. §§ 52, 104. *See generally United States v. Hutcheson*, 312 U.S. 219, 232 (1941) (statutory exemption for union activity applies "[s]o long as a union acts in its own self-interest and does not combine with non-labor groups").

employers that enables the employers to engage in anti-competitive conduct that would violate the antitrust laws if done by the employers on their own. In that "very narrow" area, *Allen Bradley Co. v. Local Union No. 3, IBEW*, 325 U.S. 797, 801 (1945), the antitrust laws, which seek to foster competition, are in tension with the labor laws, which permit unions to bargain with groups of employers and to further the interests of the employees they represent by removing certain terms and conditions of employment from competition among the employers.

The nonstatutory labor exemption adopted by this Court has been carefully crafted in a series of cases to relieve that tension, without unnecessarily undermining the achievement of either statute's objectives, by shielding the parties to such agrements from antitrust liability only where the agreements are reached through *bona fide*, arm's length collective bargaining. *See Allen Bradley, supra; United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America v. Jewel Tea Co.*, 381 U.S. 676 (1965); *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, United Ass'n of Journeymen of the Plumbing & Pipefitting Indus.*, 421 U.S. 616 (1975); *H.A. Artists & Assos., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704 (1981).

The *Brown* court acknowledged that antitrust prohibitions apply to anticompetitive practices in a labor market just as they do in a product market.[6] The court nonetheless found this Court's cases defining the nonstatutory labor exemption to be of only marginal relevance because they involve injuries to businesses that asserted that they were being injured by anticompetitive conduct in the

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[6] *See, e.g., Radovich v. National Football League*, 352 U.S. 445, 453-54 (1957); *Anderson v. Shipowners Ass'n*, 272 U.S. 359 (1926); *Mackey v. National Football League*, 543 F.2d 606, 616-18 (8th Cir. 1976); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978).

product market, whereas here the asserted injuries are to employees in the labor market. *See* 50 F.3d at 1050 ("the Court consistently has struggled to balance the interests of those involved in collective bargaining against the impact of their activities on the *product market*, paying little attention to any impact on the *labor market*").

But this Court's cases rest on the principle that the nonstatutory labor exemption should not be used to immunize employer groups from antitrust liability for unilateral anticompetitive actions taken solely for the employers' own interests, *without the consent of the union involved*. *See Allen Bradley*, 325 U.S. at 800 ("Quite obviously this combination of business men has violated both §§ 1 and 2 of the Sherman Act, unless its conduct is immunized by the participation of the union."); *Jewel Tea*, 381 U.S. at 689-90 (a collective bargaining agreement provision restricting the hours of operation of competing food store owners "is so intimately related to wages, hours and working conditions that the union's successful attempt to obtain that provision through bona fide, arm's length bargaining in pursuit of their own labor union policies" is within the nonstatutory labor exemption to the antitrust laws) (White, J.) (plurality opinion). *See also Pennington*, 381 U.S. at 661-66; *Connell*, 421 U.S. at 622.

In *Brown* and *Williams*, the courts of appeals thus would create a far more expansive antitrust exemption than anything contemplated by this Court, much less by the antitrust and labor statutes themselves. Under the rule adopted below, the nonstatutory labor exemption would shelter unreasonably anticompetitive conduct by a group of employers to which the union had never at any time consented. Such a rule would both deter the exercise of rights established by the NLRA and shield anticompetitive conduct that the antitrust laws are intended to prohibit.

C. As the experience of major league baseball demonstrates, *see* MLBPA's Motion for Leave to File Brief

Amicus Curiae, the rule adopted below has substantial deleterious consequences for labor relations in the sports and entertainment industries. And the rule represents a profound departure from the principles established by this Court to govern the harmonization of federal labor and antitrust laws. This case merits the Court's plenary consideration.

CONCLUSION

For the foregoing reasons, the petition for *certiorari* to the United States Court of Appeals for the District of Columbia Circuit should be granted.

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No. 95-388

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,

Petitioners,

—v.—

PRO FOOTBALL, INC., d/b/a WASHINGTON REDSKINS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF THE NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION AND THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

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MOTION OF THE NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION AND THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to Rule 37 of the Rules of this Court, The National Hockey League Players Association ("NHLPA") and The National Football League Players Association ("NFLPA") respectfully move for leave to file the accompanying brief as *amici curiae* in support of the Petition. Petitioners have consented to the filing of the brief in support of the Petition; respondents have not.

INTEREST OF THE NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION AND THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION

The NHLPA and NFLPA are the sole and exclusive collective bargaining representatives of players in, respectively, the National Hockey League ("NHL") and National Football League ("NFL"). As a result, the NHLPA and NFLPA are regularly engaged in multi-employer bargaining in professional team sports—a process that is being seriously undermined as a result of the decision below.

The NHLPA and NFLPA's analysis of the practical significance and consequences of the decision below thus provides an important perspective which they believe will assist the Court. As the representatives of unionized employees in professional team sports industries, the NFLPA and NHLPA have a unique familiarity with collective bargaining in multi-employer industries and the application of the nonstatutory labor exemption in this context. As set forth in the accompanying amicus brief, the NHLPA and NFLPA are concerned that the decision of the court below will severely damage both labor and antitrust policies and will, if not corrected, signficantly impede the ability of employers and employees in multi-employer industries to reach collective bargaining agreements.

In submitting the accompanying amicus brief supporting the petition for writ of certiorari, the NHLPA and NFLPA wish to explain why, from their perspective, the issues raised by the decision below are of such importance as to warrant certiorari review. The NHLPA and NFLPA believe that this perspective will assist the Court in its consideration of the Petition and therefore respectfully move for leave to file the accompanying brief as *amici curiae*.

Respectfully submitted,

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November 13, 1995

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICI CURIAE OF THE NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION AND THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION IN SUPPORT OF PETITIONERS

Pursuant to Rule 37 of the Rules of this Court, this brief is respectfully submitted, in support of the Petition, by *amici curiae*, the National Hockey League Players Association ("NHLPA") and the National Football League Players Association ("NFLPA"). The consent of the parties to the filing of this brief has been requested. Petitioners have given consent; respondents have not.

INTEREST OF AMICI CURIAE

The NHLPA and NFLPA are the sole and exclusive collective bargaining representatives of players in, respectively, the National Hockey League ("NHL") and National Football League ("NFL"). Because the NHLPA and NFLPA are regularly engaged in multi-employer bargaining in professional team sports—a process that is being seriously undermined as a result of the decision below—the NHLPA, the NFLPA and their members have a substantial interest in the Court's resolution of the extremely important questions of antitrust and labor law policy presented by the Petition.

SUMMARY OF ARGUMENT

Unless the Petition is granted in this case, employees in unionized industries subject to multi-employer bargaining will be faced with a Hobson's choice: either decertify their unions or give up their antitrust rights. One of two paramount federal policies—the labor or antitrust laws—will thus be entirely ousted, rather than accommodated, in direct contravention of the decisions of this Court. The consequences will be particularly severe in the multi-billion dollar sports and entertainment industries, where antitrust rights are critical to protecting competition in labor markets in which unions generally try to preserve for their members the individual right to negotiate salaries established by marketplace forces.

Moreover, there is an immediate need for this Court to review the scope of the nonstatutory labor exemption in the absence of a collective bargaining agreement, since there is unlikely to be another case suitable for raising this important question any time in the near future. The reason is that union members faced with the combined deterrent of the *Brown* decision and the recent decision of the Second Circuit in *Williams v. National Basketball Association*, 45 F.3d 684 (2d Cir 1995), *pet. for cert. pending*, No. 95-137 (U.S. filed July

24, 1995) will not likely be able to endure the years of litigation that it would take to get this critical issue back before this Court. Rather, if such union members conclude that they wish to assert their antitrust rights, they are likely to simply decertify their unions—undermining the very labor law policies which the decision below purports to protect.

When the application of the nonstatutory labor exemption to employer-imposed restraints was last presented to this Court by the petition in *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), certiorari was denied (with two judges dissenting). Since that time, however, as the Solicitor General of the United States has pointed out, the decisions of the lower courts have departed even further from the rationale of the nonstatutory labor exemption and caused seriously adverse effects to labor and antitrust policies as a result. Indeed, the decertifications and lockouts which have occurred in professional team sports in recent years have stemmed in significant part from the failure of the lower courts, in decisions like *Brown* and *Williams*, to strike any accommodation between the antitrust and labor laws. It is time for this Court to restore that balance by granting the Petition and reversing the decision below.

ARGUMENT

I. UNLESS THE PETITION IS GRANTED, THE VASTLY EXPANDED NONSTATUTORY LABOR EXEMPTION CREATED BY THE LOWER COURTS WILL SEVERELY DAMAGE BOTH LABOR AND ANTITRUST POLICIES.

In 1965, this Court created the nonstatutory labor exemption to cover certain "union employer agreements" for the purpose of "accommodating the coverage of the Sherman Act to the policy of the labor laws." *Local No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965); *see*

also United Mine Workers v. Pennington, 381 U.S. 657 (1965). Specifically, the limited scope of the nonstatutory labor exemption, as articulated by this Court, was to effectuate the objective Congress expressed in the statutory labor exemption—*i.e.*, to protect the legitimate organizing and bargaining activities of *unions* from the antitrust laws. As this Court later explained:

> The basic sources of organized labor's exemption from the antitrust laws are §§ 6 and 20 of the Clayton Act, and the Norris-LaGuardia Act. These statutes declare that labor unions are not combinations or conspiracies, in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws. They do not exempt concerted action or agreements between unions and nonlabor parties. The Court has recognized, however, that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the free competition in the business markets require that *some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions.*

Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616, 621-22 (1975) (emphasis added, citations omitted).

For more than two decades, the lower courts adhered to the principles of *Jewel Tea* and *Pennington* and only applied the nonstatutory labor exemption in the context of existing union-employer agreements. In particular, the courts were careful not to permit the exemption to be used by employers as a shield for anticompetitive collusion against the will of their employees.[1] The result was an accommodation between

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[1] *See, e.g., Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Smith v. Pro-Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Kapp v. National Football League*, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979).

antitrust and labor law policies, which led not only to the preservation of antitrust rights, but also to new collective bargaining agreements and labor peace.

This careful balance between antitrust and labor policy was initially challenged by the decision of the Eighth Circuit Court of Appeals in *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991). For, although that decision was rooted in the fact that the restraints at issue had previously been the product of union agreement, it permitted the nonstatutory labor exemption to protect the continuation of employer restraints after the collective bargaining agreement had expired.

As a result of the *Powell* decision, the players in the NFL had to choose between continuing the NFLPA as their union or asserting their antitrust rights. Specifically, before the 1987 NFL season, the NFLPA engaged in collective bargaining negotiations with the NFL Management Council ("NFLMC"), the multi-employer bargaining unit of the NFL clubs. Under the CBAs that were in effect during the ten years prior to the 1987 NFL season, only one NFL player had moved to another team at the expiration of his contract, even though thousands of players supposedly were eligible to do so under the "right of first refusal/compensation" player movement rules. The NFLPA attempted to negotiate a new CBA in which players would have the opportunity to market their services to NFL clubs without restriction at some point in their careers, but the NFLMC insisted that it would never agree to a CBA in which NFL clubs could freely bid for the services of NFL players. As a result, the NFL Players went on strike at the beginning of the 1987 NFL season. However, this economic weapon proved completely ineffective. After four weeks, during which the NFL used "replacement" players in games that were broadcast by the television networks, the players reported back to work without a new CBA.

Thereafter, the NFLPA and nine players commenced an antitrust class action against the NFL and its clubs, the *Pow-*

ell litigation, alleging that the continued use of various restraints on player movement by the NFL clubs, including the right of first refusal/compensation system, constituted violations of the antitrust laws. *Powell v. National Football League*, Nos. 4-87-917 (D. Minn.) (Doty, J.). The District Court held that the non-statutory labor exemption did not continue to protect the restraints after the expiration of the collective bargaining agreement and after a judicially recognized "impasse" had been reached in negotiations on this issue. *Powell v. National Football League*, 678 F. Supp. 777, 788 (D. Minn. 1988). However, a 2-1 panel of the United States Court of Appeals For The Eighth Circuit reversed.

Because of the *Powell* decision, the players either had to give up their collective bargaining rights under the labor laws, or submit to the system imposed by the NFL and its clubs. Given this choice, the players determined to give up their collective bargaining rights. Individual players then commenced antitrust suits against the NFL and its clubs to assert their rights under the antitrust laws. *See, e.g., McNeil v. National Football League*, No. 4-90-476 (D. Minn.).

The NFL clubs took full advantage of the absence of a collective bargaining representative for the players. Beginning with the 1989 season, the NFL clubs implemented "Plan B," which continued the right of first refusal/compensation system with only slight modifications; froze playoff money; froze injury protection pay for veterans and reduced it for rookies; froze termination pay; lowered minimum salaries; reduced life, health and dental insurance; froze expansion bonuses; and froze pre-season player per diems. Plan B also threatened to eliminate individual bargaining by players altogether (even though no union was in existence to bargain on behalf of the players) and to implement a leaguewide wage scale covering all players beginning with the 1993 season. For four NFL seasons, from 1989 to 1992, the players suffered these effects, without any collective bargaining or labor law rights.

In September 1992, after a three-month trial, a jury verdict was rendered in *McNeil* which determined that Plan B was an unreasonable restraint of trade in violation of § 1 of the Sherman Act. Subsequently, a class action suit was filed on behalf of all NFL players challenging continued implementation of Plan B or similar restraints on player movement. *See White v. National Football League*, No. 4-92-906 (D. Minn.). In January 1993, the NFL and its member clubs agreed to a global settlement of the *White* class action and other player suits challenging Plan B. It was only after this antitrust settlement that the NFL players were able to reconstitute the NFLPA as their union and resume collective bargaining negotiations which led to a new CBA.

While the NFL players suffered the adverse consequences of the Powell decision—being forced to abandon collective bargaining and all of their labor law rights for more than three years—other employees did not have to follow suit immediately because union agreement was still the touchstone of the nonstatutory labor exemption among the lower courts. The *Powell* decision itself endorsed the Eighth Circuit's previous decision in *Mackey*, which held that employers could not use the nonstatutory labor exemption to protect anticompetitive restraints that employers themselves had unilaterally thrust upon weak employees without ever having received the arm's length agreement of the employees' union. *See Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

This fundamental principle, however, was completely abandoned by the lower court decisions in *Williams* and *Brown*, which held that antitrust policy was completely ousted in any unionized industry in which multi-employer bargaining takes place. According to these decisions, employers in such industries enjoy antitrust immunity to impose the most blatant restrictions on labor market competition imaginable—without any existing or prior union agreement—unless the employees take the step of abandoning their collective bargaining rights.

The end result of these decision is clear: unless this Court grants the Petition, there will no longer be any accommodation of antitrust and labor law policy; one or the other will be completely ousted from entire industries. The basic tenets of *Jewel Tea*, *Pennington*, and *Connell* will thus be ignored, and a narrow, judicially-created exemption designed to further Congressional intent will end up subverting it.

Requiring union self-destruction as a condition for employees to assert their antitrust rights obviously is not supportive of federal labor law policies. Moreover, the decision below will further undermine these policies by making it less likely that employers engaged in multi-employer bargaining will bargain in good faith to reach a new collective bargaining agreement. Since, under the decision below, employers are immune from antitrust liability even if they unilaterally impose unreasonable restraints of trade which have *never* been agreed to by a union, there is no incentive for these employers to engage in the give and take that is necessary to reach a collective bargaining agreement. As Judge Wald notes in her dissent:

> [The majority's rule] decisively tips the balance by giving employers important *new* rights, together with new incentives to harden their bargaining positions. Because employers can now unilaterally impose labor market restraints that heretofore might have exposed them to antitrust liability, the majority's rule provides new incentives to raise the stakes in bargaining in hope of winning industry-wide labor market restraints that might never before have been attempted. It also encourages employer groups to hang tough on their demands, since at impasse they may be able to impose any bargaining proposals the employees have rejected without fear of antitrust liability.

Williams v. National Basketball Association, 45 F.3d at 1064 (2d Cir. 1995) (Wald, J. dissenting) (emphasis in original).

The recent chaos in professional basketball, in the wake of the *Williams* and *Brown* decisions, illustrates how the expansion of the nonstatutory labor exemption by the lower courts has wreaked havoc with both labor and antitrust policies. Prior to *Williams*, the NBA never experienced a work stoppage and always resolved its antitrust litigation with a long-term negotiated settlement and labor peace. By contrast, as a direct result of the decisions in *Williams* and *Brown*, the most recent round of collective bargaining in the NBA was conducted in a highly destructive environment, resulting in the first work stoppage in NBA history. Shielded under *Williams* with total antitrust immunity for whatever they might propose in bargaining, the NBA owners insisted upon acceptance of restraints more onerous than the NBA players had ever previously accepted. Although most NBA players were opposed to these restraints, they were unable to agree upon whether it was wise to give up their antitrust or labor law rights, and ended up divided in a bitter decertification election. Tellingly, the NBA employers campaigned to keep the union in place in order to provide the teams with antitrust immunity. The anomaly of employers fighting to keep a union in place in order to protect themselves dramatically illustrates how the decision below and in *Williams* have completely distorted the nonstatutory labor exemption.

Indeed, while the court below claims that the recent labor experience in the NHL demonstrates how collective bargaining can be successful in sports and entertainment industries without any antitrust protection for employees, the facts prove exactly the opposite proposition. Specifically, after the expiration of the last CBA in the NHL in September 1993, the NHL owners made it clear that they wanted a new "salary cap" to eliminate price competition for player services—a demand which the NHLPA and its members strongly resisted. The NHL owners, however, did not unilaterally impose a salary cap—even after an impasse in the negotiations has been reached—*because of the risk, prior to the Brown deci-*

sion, of antitrust liability.[2] Instead, the NHL owners resorted to a lock-out (a "tactic" not prohibited by the antitrust laws in a unionized industry) and a new CBA was eventually reached which did *not* include a salary cap. Contrary to the factual assumptions of the decision below, the collective bargaining process was able to work only because, prior to the *Brown* decision, the NHL owners believed that the antitrust laws prohibited them from simply imposing the new salary cap restraints they desired.

Finally, it is particularly important for this Court to review and clarify the scope of the nonstatutory labor exemption now, before further damage is done to antitrust and labor law policy in the numerous unionized industries in which multi-employer bargaining takes place. Absent review in either this case or *Williams*, it is unlikely that this Court will soon get another suitable opportunity to repair this area of judge-made law. The reason is that if *Brown* and *Williams* are not reversed, union members wishing to pursue their antitrust rights are most likely to simply decertify their unions, rather than face years of litigation trying to get this issue addressed by the Supreme Court. Similarly, there will be no vehicle for this Court to review the lost antitrust rights of union members who, unwilling to decertify, do not even try to assert their antitrust rights in court. The Petition herein thus presents the best opportunity for this Court to address these paramount issues of federal policy.

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[2] Harry Sinden, the President-General Manager of the Boston Bruins admitted publicly to just these antitrust concerns, stating that "[a]t the moment we have no plans to implement anything the way the baseball owners did. We don't have the (antitrust) protection they do . . . We do have the right to implement our final proposal, as long as the proposal is not (tantamount to) a restraint of trade." Joe Gordon, *NHLPA Eyes Suit; Owners May Hear Antitrust Charge*, *Boston Herald*, December 25 1994, at B24.

CONCLUSION

For all of the above stated reasons, as well as those stated in the Petition, this Court should grant certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

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November 13, 1995

Supreme Court, U.S.
FILED
JAN 19 1996
CLERK

No. 95-388

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,
Petitioners,

v.

PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1995
CERTIORARI GRANTED DECEMBER 8, 1995

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Order of the District Court Granting Plaintiffs' Motion To Strike the Nonstatutory Labor Exemption Defense and Denying Defendants' Cross-Motion for Summary Judgment, dated June 4, 1991	91a
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BROWN, *et al.*,

v.

PRO FOOTBALL, INC., *et al.*

CIVIL DOCKET FOR CASE NO. 90-CV-1071

Date	No.	PROCEEDINGS
5/9/90	1	COMPLAINT filed; Exhibits (2); summons (29) issued (dot) [Entry date 05/11/90]
		* * * *
6/1/90	7	AMENDED COMPLAINT by plaintiffs; jury demand [1-1] (ks) [Entry date 06/04/90]
6/11/90	8	ANSWER by all defendants to amended complaint (ks) [Entry date 06/12/90]
		* * * *
9/10/90	30	MOTION by plaintiffs to strike, or for partial summary judgment (ks) [Entry date 09/11/90]
9/10/90	31	NOTICE OF FILING by plaintiffs of statement of material facts not in genuine dispute and supporting exhibits (1-35), and memorandum in support of plaintiffs' motion to strike, or for partial summary judgment (FILED UNDER SEAL IN ROOM 1800) (ks) [Entry date 09/11/90]
		* * * *
10/19/90	45	MOTION by defendants for summary judgment; and in opposition to plaintiffs' motion to strike (FILED UNDER SEAL IN ROOM 1800) (ks) [Entry date 10/23/90]

Date	No.	PROCEEDINGS
10/29/90	46	MEMORANDUM by plaintiffs in support of of motion to strike [30-1] by ANTONY BROWN, motion for partial summary judgment [30-2] by ANTONY BROWN; and in opposition to defendants' motion for summary judgment (ks)
		* * * *
12/17/90	52	MOTION by plaintiffs for summary judgment; Exhibits (13) (MEMORANDUM IN SUPPORT OF MOTION, AND SUPPLEMENTAL STATEMENT OF MATERIAL FACTS, AND SUPPLEMENTAL EXHIBITS (13) FILED UNDER SEAL IN ROOM 1800) (ks) [Entry date 12/18/90]
		* * * *
6/4/91	71	MEMORANDUM OPINION by Judge Royce C. Lamberth striking nonstatutory labor exemption defense (N) (dot) [Entry date 06/10/91]
6/4/91	72	ORDER by Judge Royce C. Lamberth: denying motion for summary judgment on the nonstatutory labor exemption defense [45-1] by NFL, granting motion for partial summary judgment on the nonstatutory labor exemption [30-2] by ANTONY BROWN (N) (dot) [Entry date 06/11/91]
		* * * *
7/5/91	78	RESPONSE by defendants in opposition to motion for summary judgment [52-1] by ANTONY BROWN; exhibits (7) (dot) [Entry date 07/10/91]
		* * * *
7/15/91	80	REPLY by plaintiffs in support of motion for summary judgment [52-1] by ANTONY BROWN; exhibits (14) (cjp) [Entry date 07/18/91]
		* * * *

Date	No.	PROCEEDINGS
3/10/92	94	MEMORANDUM OPINION by Judge Royce C. Lamberth (N) (fle)
3/10/92	95	ORDER by Judge Royce C. Lamberth: granting motion for summary judgment [52-1] by ANTONY BROWN; entering summary judgment on behalf of the plaintiff class against the NFL and the 28 NFL Club defendants. (N) (fle)
		* * * *
3/16/92	97	MOTION filed by defendants for reconsideration, or, in the alternative, certification for interlocutory review of this Court's memorandum opinion of 3/10/92 (dot) [Entry date 03/18/92]
		* * * *
4/3/92	103	RESPONSE by plaintiffs in opposition to motion for reconsideration [97-1] by defendants (dot) [Entry date 04/06/92]
4/6/92	104	REPLY MEMORANDUM by defendants in support of motion for reconsideration [97-1], or motion for certification for interlocutory review of this Court's memorandum opinion of 3/10/92 [97-2] by defendants (dot) [Entry date 04/07/92]
		* * * *
9/2/92	254	MEMORANDUM OPINION AND ORDER by Judge Royce C. Lamberth: denying motion for reconsideration [97-1] by defendants, denying motion for certification for interlocutory review of this Court's memorandum opinion of 3/10/92 [97-2] by defendants. (N) (mal)
9/2/92	255	PRETRIAL STATEMENTS (joint) by defendants and plaintiffs; exhibits (26) (adc) [Entry date 09/03/92]
		* * * *

Date	No.	PROCEEDINGS
9/21/92	—	JURY TRIAL before Judge Royce C. Lamberth same jury of 8 begun and continued to 9:30 9/22/92 reporter: Theresa Sorensen (fle) [Entry date 09/22/92]
9/22/92	—	JURY TRIAL before Judge Royce C. Lamberth same jury of 8 resumed and continued to 9:00 9/23/92 reporter: Theresa Sorensen (fle)
		* * * *
9/23/92	—	JURY TRIAL before Judge Royce C. Lamberth same jury of 8 resumed and continued to 9:30 9/24/92 reporter: Theresa Sorensen (fle) [Entry date 09/24/92]
9/24/92	—	JURY TRIAL before Judge Royce C. Lamberth same jury of 8 resumed and continued to 9:30 9/25/92 reporter: Theresa Sorensen (fle)
		* * * *
9/25/92	—	JURY TRIAL before Judge Royce C. Lamberth same jury of 8 resumed and continued to 9:00 9/28/92 reporter: Theresa Sorensen (fle) [Entry date 09/28/92]
		* * * *
9/28/92	—	JURY TRIAL before Judge Royce C. Lamberth same jury of 8 resumed and continued to 9:00 9/29/92 reporter: Theresa Sorensen (fle)
		* * * *
9/29/92	—	JURY TRIAL before Judge Royce C. Lamberth same jury of 8 resumed and continued to 9:30 9/30/92 reporter: Theresa Sorensen (fle) [Entry date 09/30/92]
		* * * *

Date	No.	PROCEEDINGS
9/30/92	—	JURY TRIAL before Judge Royce C. Lamberth same jury of 8 resumed and continued to 9:30 10/1/92 reporter: Theresa Sorensen (fle)
		* * * *
10/1/92	—	JURY TRIAL before Judge Royce C. Lamberth same jury of 8 resumed and continued to 9:00 10/2/92 reporter: Theresa Sorensen (fle)
		* * * *
10/2/92	—	JURY TRIAL before Judge Royce C. Lamberth same jury of 8 resumed and continued to 9:30 10/5/92 reporter: Theresa Sorensen (fle)
10/5/92	—	JURY DELIBERATIONS resumed and concluded Judge Royce C. Lamberth; verdict for plaintiffs against the defendants. reporter: Theresa Sorensen (fle)
10/5/92	325	JUDGMENT ON THE VERDICT FOR 235 PLAINTIFFS in individual amounts against the defendants. (N) (fle) [Edit date 10/06/92]
		* * * *
5/12/93	—	PERMANENT INJUNCTION against defendants; permanently enjoining defendants from agreeing among themselves, from conspiring, and/or from performing any act in furtherance of any agreement or conspiracy, to establish, whether overtly or otherwise, a uniform regular-reason salary for any category of players whom defendants may at any time employ. (fle) [Entry date 05/13/93]
		* * * *

Date	No.	PROCEEDINGS
9/10/93	395	NOTICE OF APPEAL by defendants from order [364-1] entered on: 5/13/93. The fee was previously paid in USCA No. 93-7102 (filed 6/9/93). Copy mailed to Joseph A. Yablonski. (dot) [Entry date 09/14/93]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BROWN, *et al.*,
Plaintiffs-Appellees,

v.

PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,
Defendants-Appellants.

CIVIL DOCKET FOR CASE NOS. 93-7165 and 94-7071

Date	PROCEEDINGS
9/27/93	CIVIL-PRIVATE CASE docketed. Notice of Appeal filed by Appellants Pro Football, Inc., *et al.* [23353-1] (wmw) [93-7165]
	* * * *
10/20/93	INITIAL SUBMISSIONS filed by Appellants Pro Football, Inc., *et al.*, in 93-7165, [26430-1]: docketing statement; certificate of counsel; statement of issues; lower court decision; deferred appendix notice (Deferred Appendix needed=n). (jth) [93-7165]
	* * * *
9/2/94	BRIEF filed by Appellants in 93-7165 and 94-7071 [70397-1]. Copies: 15. Certificate of service date 9/2/94. [93-7165, 94-7071] (wmw)
9/2/94	JOINT APPENDIX filed by Appellees Antony Brown, *et al.*, and Appellants in 93-7165 and 94-7071 [70414-1]. Copies: 10. [VOLUMES I through VII] Certificate of service date 9/2/94. [93-7165, 94-7071] (wmw)
	* * * *

Date	PROCEEDINGS
9/28/94	PER CURIAM ORDER filed granting motion leave to file motion to allow amicus filed by Ntl Basketball Assoc, Nt. Hockey Leag, Natl Basketball Assn, Natl Hockey Leag [71187-1] in 94-7071, 93-7165 directing Clerk to file non-party motion to allow amicus [71174-1] in 93-7165, 94-7071 granting non-party motion to allow amicus filed by Nt. Hockey Leag, Natl Basketball Assn, Natl Hockey Leag, Ntl Basktball Assoc [71174-1] in 93-7165, 94-7071. Before Judges Edwards, Wald, Randolph. [93-7165, 94-7071] (cwc)
9/28/94	Per order lodged brief of amicus NBA and NHL [71178-1] in 93-7165, [71178-1] and in 94-7071 is filed. [93-7165, 94-7071] (cwc)
9/28/94	Per order lodged non-party motion to allow amicus (NBA and NHL) [77174-1] in 93-7165, non-party motion to allow amicus (NBA and NHL) [71174-1] in 94-7071 is filed. [93-7165, 94-7071] (cwc)
	* * * *
10/4/94	BRIEF filed by Appellees in 93-7165 and 94-7071 [76239-1]. Copies: 15. Certificate of service date 10/4/94. [93-7165, 94-7071] (wmw)
	* * * *
10/12/94	PER CURIAM ORDER filed granting non-party motion to allow amicus filed by Natl Basketball Plyr Assn., Natl Hockey Leag Ply Assn. [76957-1] in 93-7165, 94-7071. Before Judges Edwards, Wald, Randolph. [93-7165, 94-7071] (cwc)
	* * * *
10/17/94	BRIEF filed by Amicus Curiae Natl Basketball Plyr and Amicus Curiae Natl Hockey Leag Ply in 93-7165 and 94-7071 [78722-1]. Copies: 15. Certificate of service date 10/17/94. [93-7165, 94-7071] (wmw)
	* * * *

Date	PROCEEDINGS
10/25/94	REPLY BRIEF filed by Appellants in 93-7165 and 94-7071 [80591-1]. Copies: 16. Certificate of service date 10/25/94. [93-7165, 94-7071] (wmw)
	* * * *
11/17/94	ORAL ARGUMENT HELD before Edwards, Wald, Randolph. [93-7165, 94-7071] (jas)
	* * * *
3/21/95	JUDGMENT for the reasons in the accompanying opinion reversing [111665-1] and remanding case to the DC [111665-2]. Before Judges Edwards, Wald, Randolph. [93-7165, 94-7071] (edb)
3/21/95	OPINION (30 pgs) for the Court filed by Judge Edwards, DISSENTING OPINION (25 pgs) filed by Judge Wald. [93-7165, 94-7071] (edb)
	* * * *
4/19/95	PETITION for rehearing [118426-1] and SUGGESTION for rehearing in banc [118426-2] in 93-7165 and 94-7071 (20 copies) filed by Appellees Antony Brown, *et al.* [93-7165, 94-7071] (wmw)
	* * * *
5/5/95	BRIEF filed by Amicus USA in 93-7165 and 94-7071 in support of petition for rehearing [122076-1]. Copies: 20. Certificate of service date 5/5/95. [93-7165, 94-7071] (wmw)
	* * * *
6/12/95	PER CURIAM ORDER filed denying appellees' petition for rehearing [118426-1]. (Mandate may issue on or after 6/20/95 in 93-7165 and 94-7071). Before Judges Edwards, Wald and Randolph. [CIRCUIT JUDGE WALD WOULD GRANT THE PETITION FOR REHEARING]. [93-7165, 94-7071] (jth)

Date	PROCEEDINGS
6/12/95	PER CURIAM ORDER, In Banc, filed denying the suggestion for rehearing in banc [118426-2]. Before Judges Edwards, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel. [A STATEMENT OF CIRCUIT JUDGE TATEL CONCURRING IN THE DENIAL OF REHEARING IN BANC IS ATTACHED. CIRCUIT JUDGE WALD WOULD GRANT THE SUGGESTION. A STATEMENT BY JUDGE WALD IS ATTACHED]. [93-7165, 04-7071] (jth)
	* * * *
6/27/95	MANDATE ISSUED to Clerk, District Court [132532-1] in 93-7165 and 94-7071. [93-7165, 94-7071] (jas)

[NFL Logo]

NFL MANAGEMENT COUNCIL
Representing the Member Clubs of the
National Football League

April 7, 1989

Mr. Eugene Upshaw
NFL PLAYERS ASSOCIATION
2021 L Street, NW
Washington, DC 20035

Dear Gene:

One resolution adopted at the League's recent meeting in Palm Desert concerns the clubs' interest in establishing a six-player developmental squad next season. Copy of 1989 Resolution G-2, adopted Wednesday, March 22, is enclosed.

The Management Council desires to negotiate with your union on the terms and conditions applicable to developmental squad players.

We suggest a meeting on either April 12, April 14, during the week of April 17 or on any other date reasonably soon thereafter to discuss these matters.

Please give me a call in this connection at your earliest convenience.

Very truly yours,

/s/ Jack
J. M. DONLAN
Executive Director

JMD:db

WEDNESDAY MORNING, MARCH 22

The meeting reconvened in Executive Session. The combined Long Range/Finance Committee recommendations were reviewed and the following action was taken:

1989 RESOLUTION
G-2

RESOLVED, that appropriate sections of the NFL Constitution and Bylaws be amended to reflect the following:

1. Effective from passage of this resolution until June 1, 1989, clubs will be limited to a year-round roster limit of 90 players and thereafter will be limited to a year-round roster limit of 80 players on the following combined lists: Active, Inactive, Reserve/Injured, Reserve/Physically Unable to Perform, Reserve/Non-Football Illness/Injury, Reserve/Suspended, Developmental Squad, Exempt, and Future. The 80-player limit will not include any players on the following lists: Reserve/Retired, Reserve/Did Not Report, Reserve/Left Squad, Reserve/Military, unsigned draft choices, unsigned Veteran Free Agents, Unprotected players, and players who have been declared ineligible to participate (suspended) by the Commissioner.

2. Clubs will be required to reduce their Active Lists to 60 players by 4 p.m., New York time, on the Tuesday after the third pre-season weekend and to 47 players by 12 noon, New York time, on the Monday before the first regular season game. (For 1989, the applicable dates are Tuesday, August 29, for the cut to 60 and Monday, September 4, for the cut to 47).

Clubs must declare an Active List of 45 players and Inactive List of two players no later than one hour prior to kickoff of each game.

All waiver requests at the final cutdown will be Procedural Recall; clubs will have until 12 noon, NYT, on Tuesday to file claims.

3. After 4 p.m., NYT, on Tuesday, September 5, clubs may establish a Developmental Squad of up to six players by signing free agents to special services contracts of no more than $—— per week. Such contracts will also include a negotiated salary that the player will receive if the club subsequently decides to add the player to its Active List and signs him to an NFL Player Contract. The following will apply to the Developmental Squad:

a. Only players whose experience is designated as "R" (rookie) or "1" (first-year player) will be eligible for the Developmental Squad. (A "Rookie" is defined as a player who has not previously been under contract to a professional football team. Players who have been active in another professional football league or whose NFL experience is limited to training camp or fewer than three games on an Active List during the regular season or postseason are "first-year players.")

b. If a club signs a player on its Developmental Squad to its Active List, it must either use one of its five free activations or request procedural recall waivers. NFL Players Contracts executed with players who are subject to procedural recall waivers are subject to customary restrictions (no guarantees, no performance bonuses, etc.).

c. No player may be moved directly from a club's Active List to its Developmental Squad. Such players must first be waived and terminated, then signed to a club's Developmental Squad.

d. Clubs may not replace any injured Developmental Squad player until the club terminates him. Even if unable to practice, injured Developmental Squad players will continue to count within the six-player limit.

e. Clubs are permitted to terminate a Developmental Squad player at any time by notification to

the League Office, and the club may sign another player to its Developmental Squad. The League's waiver system will not apply to such termination.

4. Clubs may not sign players for their Future List until the day after the Super Bowl.

5. The following will apply to players who are placed on Reserve/Injured with "major" (four-week) injuries:

a. A player placed on Reserve/Injured prior to or concurrent with the final roster reduction may not return to his club's Active List in that season under any circumstances. Clubs may request waivers on such players at any time or retain them on their Reserve/Injured List for the rest of the season. Such players may not practice.

b. Players placed on Reserve/Injured after the final roster reduction will be eligible to return to the club's Active List after a minimum of six games, either by free activation or by procedural recall waivers. Clubs will be permitted five free activations during the regular season.

For such players, clubs will have two options: option one is to begin practice after a minimum of four weeks, and option two is to begin practice after a minimum of six weeks on Reserve/Injured.

Option One: If a player begins practice after a minimum of four weeks, the club is permitted to practice the player for a maximum of two weeks, after which it must either return him to the Active List or request waivers, unless he has been injured; if injured, the player may be retained on Reserve/Injured, but he will not be eligible to practice or to be activated thereafter.

Option Two: If a player begins practice after a minimum of six weeks on Reserve/Injured, the

player is eligible to practice for the rest of the season, but he counts against the club's Developmental Squad limit of six players.

6. Players who are placed on Reserve/Injured with "minor" (less than four week) injuries must be placed on waivers as soon as they are healthy.

Effect:

Establishes a new system of player-personnel procedures involving squad size and Reserve/Injured, and introduces a six-man Developmental Squad.

Motion by Philadelphia, second by Atlanta.

VOTE:

22-5-1 (Dallas, Los Angeles Raiders, New York Jets, Pittsburgh, Washington, No; Miami, Passed)

[NFL Logo]

NFL MANAGEMENT COUNCIL
Representing the Member Clubs of the
National Football League

May 18, 1989

Mr. Eugene Upshaw
NFL PLAYERS ASSOCIATION
2021 L Street, NW
Washington, DC 20036

Dear Gene:

Over a month has now elapsed since April 7, 1989 when we sent to you a copy of Resolution G-2 relating to the developmental squad as adopted by the clubs at the winter League Meeting. At that time we stated that we wished to negotiate with the NFLPA concerning terms and conditions for developmental squad players. On April 26 Dick Berthelsen indicated he would check with you regarding a convenient meeting date, and subsequently, on April 28, we attempted to answer some of Dick's questions in writing, again urging a prompt reply. On May 2, I again mentioned this subject to you in Washington during our Board hearings, as did Jim Conway in a separate discussion. To date, we have had no response from you or from Dick on this subject.

This letter represents a second formal notification to you that the Management Council wishes to meet and confer with your organization in accordance with our mutual obligations under the National Labor Relations Act for the purpose of negotiating terms and conditions applicable to developmental squad players to be employed by the clubs beginning with the 1989 season. Specifically, we now propose the following terms and conditions for developmental squad players:

1. Make editorial modifications as necessary throughout the 1982 Collective Bargaining Agreement, as amended effective February 1, 1989, to reflect our intention that all currently effective work rules and benefits, e.g. pension, insurance, shall apply to developmental players, except as indicated otherwise below.

2. Article XXII, *Salaries*, shall not apply. In lieu thereof, established special services contract providing for salaries of $1,000 per week, prorated on a daily basis.

3. Article XXVIII, *Post-Season Pay*, shall not apply.

We remain ready and available to confer with you in good faith at reasonable times for the purpose of negotiating an agreement covering terms and conditions of employment for developmental players. We look forward to hearing from you in that regard at the earliest possible time.

Very truly yours,

/s/ Jack
J. M. DONLAN
Executive Director

JMD:db

[NFLPA Logo]

NATIONAL FOOTBALL LEAGUE
PLAYERS ASSOCIATION

Via fax
May 30, 1989

Mr. Jack Donlan
NFL MANAGEMENT COUNCIL
410 Park Avenue
New York, N.Y. 10025

RE: Developmental Squad

Dear Jack:

I received your letter of May 18, 1989 concerning the clubs' decision to have developmental squads starting this season.

The NFLPA is willing to agree that players can be listed on a developmental squad of an NFL Club if they have all of the benefits and protections which players on the Active List have. This, of course, would include the right to negotiate their own salaries.

Article XIX of the 1982 CBA so provided with regard to players on the Inactive List, and that concept seems to apply to developmental players as well.

I suggest we discuss this matter when we see each other next week.

Sincerely,

/s/ Gene Upshaw
GENE UPSHAW
Executive Director

GU:afs

[NFL Logo]

NFL MANAGEMENT COUNCIL
Representing the Member Clubs of the
National Football League

To: Hugh Culverhouse
Bill Bidwill
Mike Brown
Well Mara
Joe Robbie
Dan Rooney

FROM: Jack Donlan

SUBJECT: Upshaw Meeting

DATE: June 16, 1989

Jim Conway, Dennis Curran and I met with Gene Upshaw today from 12:15 to 2:30 p.m. to discuss the development squad subject. (This meeting, you'll recall, was in response to our several written requests to Gene in April and May, and was originally scheduled for last week's Retirement Board Meeting but rolled to today at Upshaw's request.)

Gene had Tom DePaso with him, but neither Allen nor Berthelsen, and the meeting was cordial, businesslike and low-keyed. We spent over an hour taking the union through our proposal, its purpose, how it works, how it relates to the new 80 player limits and IR rules, etc. Gene indicated he fully understood the developmental squad but could not agree to any arrangement that eliminated the right of any player to negotiate his individual salary. Upshaw said that no matter what salary level we proposed to pay developmental players, whether it was our $1,000 weekly or a higher number, the union would not "in principle" permit two classes of players

to exist, one with individual bargaining rights and one without. For implementation purposes, the issue is clearly at impasse.

Gordon Forbes' column in "USA Today" this morning quoted Gene as hinting at an interest in bargaining on a broader scale. When we raised the subject with him, he was somewhat equivocal. We had the general impression that Gene was genuinely eager to get back to bargaining. However, he was careful to maintain his position that a "West Coast" type system freeing every player at some point in his career was necessary. Ultimately, however, he agreed that a further meeting made sense, and he agreed to firm up a meeting early next week during the June 28-30 period or during the week of July 10.

/s/ Jack
JACK DONLAN
Executive Director

JMD:db

[NFL Logo]

NFL MANAGEMENT COUNCIL
Representing the Member Clubs of the
National Football League

To: File

FROM: Jack Donlan

SUBJECT: Upshaw Meeting—Developmental Squad

DATE: June 30, 1989

Met with Gene Upshaw on June 16th. Gene was accompanied by Tom DePaso, Conway and Curran were also in attendance. Had a full discussion of the developmental player, which was the purpose of the meeting.

Gene stated a number of times that the union could never accept the position where some players were not free to negotiate their own contracts. I mentioned to Gene that during the course of regular negotiations we had an open discussion about an entry level wage scale; that back in 1985, when the clubs were reducing their rosters from 49 to 45, Gene suggested having 4 players at a nominal salary ($400-$500); and that recently Braman said that Gene had again broached the subject of the $500-game type players. Gene had no recollection of the conversation with Braman, was aware of the conversation in '85 and also during the negotiations but had no response as to why the Union was willing to entertain a position then which would have some players not able to negotiate their contracts but now is unalterably opposed to it.

The one thing left hanging was the Developmental Player Contract which we didn't have in written form at that time. I sent it to Gene today, June 30th.

During the course of the conversation on the 16th, Gene indicated and he also was quoted in the press as saying

we shouldn't be negotiating one issue by itself but rather it should be part of the larger package. I agreed with that and told him I had been trying to get him to the bargaining table and he, in my opinion, has been avoiding the same. That generated a discussion about the system in which Gene believes the he can be flexible but within his own framework—the framework being that all players must be free at some time during the course of their careers—that once that is acceptable, he is flexible within that concept and mentioned again an entry level wage scale. My response was that we didn't think we had to accede to that position about all players being free at some time and we thought we were far more flexible with the number of different concepts we had proposed, including Plan B. Both Gene and I agreed it would be worth exploring further rather than just sitting and waiting for the court decision.

Gene was tied up the whole following week (week of the 19th in Texas) and was tied up on Monday and Tuesday (June 26-27) in depositions. Gene said he would call me about getting together on either June 28-29-30 or the week of July 10th. Not having heard from Gene, I called his office today to find out what the schedule is. He is out of the office, not expected in, may call in, I left a message and have sent his a note assuming we are going to be getting together the week of July 10th.

JMD:db

[NFLPA Logo]

NATIONAL FOOTBALL LEAGUE
PLAYERS ASSOCIATION

July 6, 1989
Via fax

Mr. Jack Donlan
Executive Director
NFL MANAGEMENT COUNCIL
410 Park Avenue
New York, NY 10022

RE: DEVELOPMENTAL SQUAD

Dear Jack:

I am writing to confirm our discussion on Friday, June 16, 1989 concerning the above subject. You told Tom DePaso and me that you wanted to sign developmental squad players to a standard form contract (yet to be developed) and pay them all a fixed wage of $1000 per week. You further stated that a player being placed in the developmental category would have to sign an NFL Player contract which would apply if he is activated, and that contract(s) could be for a multi-year term. Once on developmental, you also stated that the player would be committed to the club for the balance of the year in question, except that the club could terminate the developmental player at any time for any reason.

Tom and I rejected these conditions. We stated that all players, including developmental, should have the right to negotiate salary terms, and that no fixed wage for any group of players is acceptable to the NFLPA. Also, we are against restricting a player to one term if he can be an active player with another. Moreover, it is our position that all players are entitled to full benefits, whether they are Active or in some other category.

I also asked you in our meeting if you had any new position on free agency. You said yes, that your "new"

position was Plan B. I responded that it was our position that at some point in their careers, all players should have the right to be free. I asked you if you could identify such a point at which a player could be free, and you said at no point, except as provided by Plan B.

We discussed possible future meeting dates including the week of July 10.

Sincerely,

/s/ Gene Upshaw
GENE UPSHAW
Executive Director

GU:afs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-1071 (RCL)
Jury Trial Demanded

ANTHONY BROWN
36 White Oak Lane
Stamford, CT 06905

JAMES BISHOP
5520 Forest Isle
New Orleans, LA 70131

JOHN BUDDENBERG
55861 Bel-Haven
Bellaire, OH 43906

GARY COUCH
1112 Brown Street
Davenport, IA 52803

CRAIG DAVIS
8515 Apricot
New Orleans, LA 70118

RICKY ANDREWS
8541 Midvale
Seattle, WA 98103

THOM KAUMEYER
11239 N.E. 36th, #324
Bellevue, WA 98004

WESLEY PRITCHETT
3873 Roswell Road #22
Atlanta, GA 30342

JOHN SIMPSON
2401 Spring Creek #1102
Plano, TX 75023

Individually, and on Behalf of
All Class Members,

Plaintiffs,

v.

PRO FOOTBALL, INC., d/b/a
WASHINGTON REDSKINS
c/o CT Corporation
1025 Vermont Avenue, N.W.
Washington, D.C. 20005

THE FIVE SMITHS, INC., d/b/a
ATLANTA FALCONS
Suwanee at I-85
Suwanee, GA 30174

BUFFALO BILLS, INC., d/b/a
BUFFALO BILLS
One Bills Drive
Orchard Park, NY 14127

CHICAGO BEARS FOOTBALL CLUB, INC., d/b/a
CHICAGO BEARS
55 East Jackson Blvd.
Chicago, IL 60604

CINCINNATI BENGALS, INC., d/b/a
CINCINNATI BENGALS
200 Riverfront Stadium
Cincinnati, OH 45202

CLEVELAND BROWNS, INC., d/b/a
CLEVELAND BROWNS
100 West Tenth Street
Wilmington, DE 19801

DALLAS COWBOYS FOOTBALL CLUB, LTD., d/b/a
DALLAS COWBOYS
2355 Stemmons Freeway
Dallas, TX 75207

PDB Sports, Ltd., d/b/a
Denver Broncos
5700 Logan Street
Denver, CO 80216

The Detroit Lions, Inc., d/b/a
Detroit Lions
34th Floor
100 Renaissance Center
Detroit, MI 48243

The Green Bay Packers, Inc., d/b/a
Green Bay Packers
1265 Lombardi Avenue
Green Bay, WI 54303

Houston Oilers, Inc., d/b/a
Houston Oilers
6910 Fanin
Box 1516
Houston, TX 77251-1516

Indianapolis Colts, Inc., d/b/a
Indianapolis Colts
8272 North Lincoln Avenue
Skoakie, IL 60077

Kansas City Chifes Football Club, Inc., d/b/a
Kansas City Chiefs
2800 Commerce Tower
Kansas City, MO 64105

The Los Angeles Raiders, Ltd., d/b/a
Los Angeles Raiders
332 Center Street
El Segundo, CA 90245

Los Angeles Rams Football Company, Inc.,
d/b/a Los Angeles Rams
2327 Lincoln Avenue
Anaheim, CA 92801

MIAMI DOLPHINS, LTD., d/b/a
MIAMI DOLPHINS
4770 Biscayne Blvd., Suite 1440
Miami, FL 33137

MINNESOTA VIKINGS FOOTBALL CLUB, INC., d/b/a
MINNESOTA VIKINGS
9520 Viking Drive
Eden Prairie, MN 55344

KMS PATRIOTS, L.P.,
d/b/a NEW ENGLAND PATRIOTS
Schaefer Stadium
Foxboro, MA 02035

THE NEW ORLEANS LOUISIANA SAINTS
LIMITED PARTNERSHIP, d/b/a
NEW ORLEANS SAINTS
1500 Poydras Street
New Orleans, LA 70112

NEW YORK FOOTBALL GIANTS, INC., d/b/a
NEW YORK GIANTS
Giants Stadium
East Rutherford, NJ 07073

NEW YORK JETS FOOTBALL CLUB, INC., d/b/a
NEW YORK JETS
598 Madison Avenue
New York, NY 10022

THE PHILADELPHIA EAGLES FOOTBALL CLUB, INC.,
d/b/a PHILADELPHIA EAGLES
Philadelphia Veterans Stadium
Broad Street and Pattison Ave.
Philadelphia, PA 19148

B & B HOLDINGS, INC., d/b/a
PHOENIX CARDINALS
51 West 3rd Street
Phoenix, AZ 85281

PITTSBURGH STEELERS SPORTS, INC., d/b/a
PITTSBURGH STEELERS
Three River Stadium
300 Stadium Circle
Pittsburgh, PA 15212

THE CHARGERS FOOTBALL COMPANY, d/b/a
SAN DIEGO CHARGERS
San Diego Jack Murphy Stadium
9449 Friars Road
San Diego, CA 92120

THE SAN FRANCISCO FORTY-NINERS, LTD., d/b/a
SAN FRANCISCO FORTY-NINERS
7620 Market Street
Youngstown, OH 44512

THE SEATTLE PROFESSIONAL FOOTBALL CLUB, d/b/a
SEATTLE SEAHAWKS
5305 Lake Washington Boulevard
Kirkland, WA 98033

TAMPA BAY AREA NFL FOOTBALL, INC., d/b/a
TAMPA BAY BUCCANEERS
One Buccaneer Place
Tampa, FL 33607

NATIONAL FOOTBALL LEAGUE
410 Park Avenue
New York, NY 10022

Defendants.

FIRST AMENDED CLASS-ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR TREBLE DAMAGES

For their complaint in this action, Plaintiffs allege as follows:

Nature of the Case

1. This is a horizontal price-fixing case brought under the federal antitrust laws. Plaintiffs are professional foot-

ball players. Defendants are the member Clubs of the National Football League ("NFL" or "League") and the League itself. The NFL has a monopoly in the major professional football market.

2. In March 1989, Defendants agreed among themselves, through an amendment to the NFL Constitution and By Laws, to establish a six-person "Developmental Squad" for each Club and to fix the price that each Club would pay for the services of players assigned to the Developmental Squad. To implement their price-fixing agreement, Defendants later agreed that *all* Developmental Squal players would be required to sign an identical form contract. Defendants agreed among themselves to pay such players the flat amount of $1,000 for each week during the NFL's sixteen-week season, without regard to the fair market value of each player's services. No Club was permitted to pay a Developmental Squad player more than $1,000 per week, and all Developmental Squad contracts were required to be submitted to the NFL to police compliance with Defendants' conspiracy to restrain trade.

3. Plaintiff-players, who are among the most skilled in their profession, have been denied the right to sell their services in a competitive market. All Developmental Squad players have been compensated less than they would have been, absent Defendants' price-fixing combination and conspiracy, and thus have been injured in their "business" and "property" and are entitled to injunctive relief and to recover treble damages.

JURISDICTION AND VENUE

4. This Court has subject-matter jurisdiction over the claims asserted in the Complaint under the Sherman Antitrust Act, 15 U.S.C. § 1, under the Clayton Antitrust Act, 15 U.S.C. §§ 15, 26, and under 28 U.S.C. §§ 1331, 1337 and 2201.

5. Venue is proper in this Judicial District pursuant to the provisions of 15 U.S.C. §§ 15 and 22, and 28 U.S.C. § 1391. Each of the Defendants transacts business or is doing business within this Judicial District. All of the Defendant Clubs have participated in professional football games within the District of Columbia pursuant to schedules developed by the NFL, and all of the Defendants derive substantial revenues from business transacted within the District of Columbia. All of the Defendant Clubs have caused their games to be broadcast and telecast in this District pursuant to television contracts between the League and the major networks. The Clubs and Defendant NFL have participated in conferences and meetings, including League meetings, within the District of Columbia. Many of the acts done in furtherance of their conspiracy to restrain trade were committed or carried out or resulted in harm to Plaintiffs and members of the Plaintiff class within the District of Columbia.

THE PARTIES

6. All of the Plaintiffs herein are players in the National Football League. During the 1989 professional football season, all of the Plaintiffs were, for all or part of the season, on the Developmental Squads of one or more of the Clubs in the NFL and accordingly were required to sign a form contract which fixed the price the Clubs would pay for their services at $1,000 per week. The names and addresses of the Plaintiffs and the Clubs with which they contracted during the 1989 NFL season are as follows:

Name and Address	1989 NFL Club(s)
Anthony Brown 36 White Oak Lane Stamford, CT 06905	Buffalo Bills
James Bishop 5520 Forest Isle New Orleans, LA 70131	Washington Redskins

Name and Address	1989 NFL Club(s)
John Buddenberg 55861 Bel-Haven Bellaire, OH 43906	Cleveland Browns Minnesota Vikings
Ricky Andrews 8541 Midvale Seattle, WA 98103	San Diego Chargers
Gary Couch 1112 Brown Street Davenport, IA 52803	Minnesota Vikings
Craig Davis 8515 Apricot New Orleans, LA 70118	San Diego Chargers
Thom Kaumeyer 11239 N.E. 36th, #324 Seattle, WA 98004	Seattle Seahawks
Wesley Pritchett 3873 Roswell Road #22 Atlanta, GA 30342	Buffalo Bills
John Simpson 2401 Spring Creek #1102 Plano, TX 75023	New England Patriots

7. Each Plaintiff brings this action in his own right to obtain relief for injuries to him in his trade and business and also brings this action on behalf a class of all Developmental Squad players in the NFL.

8. Defendants herein are Pro-Football, Inc., a Maryland corporation, which owns and operates the Washington Redskins within the District of Columbia, and the twenty-seven other member Clubs of the National Football League. Each of the NFL member Clubs listed below owns an NFL franchise for the operation of a professional football team for profit under the team name in the cities listed:

NFL Member Club	Team Name	Principal Place of Business
The Five Smiths Inc. a Georgia corporation	Atlanta Falcons	Atlanta, Georgia
Buffalo Bills, Inc. a New York corporation	Buffalo Bills	Buffalo, New York

NFL Member Club	Team Name	Principal Place of Business
Chicago Bears Football Club, Inc., a Delaware corporation	Chicago Bears	Chicago, Illinois
Cincinnati Bengals, Inc., an Ohio corporation	Cincinnati Bengals	Cincinnati, Ohio
Cleveland Browns, Inc., a Delaware corporation	Cleveland Browns	Cleveland, Ohio
Dallas Cowboys Football Club, Ltd., a Texas limited partnership	Dallas Cowboys	Dallas, Texas
PDB Sports, Ltd., a Colorado limited partnership	Denver Broncos	Denver, Colorado
The Detroit Lions, Inc., a Michigan corporation	Detroit Lions	Detroit, Michigan
Green Bay Packers, Inc., a Wisconsin corporation	Green Bay Packers	Green Bay, Wisconsin
Houston Oilers, Inc., a Texas Corporation	Houston Oilers	Houston, Texas
Indianapolis Colts, Inc., a Delaware corporation	Indianapolis Colts	Indianapolis, Indiana
Kansas City Chiefs Football Club, Inc., a Texas corporation	Kansas City Chiefs	Kansas City, MO
Los Angeles Raiders, Ltd., a California limited partnership	Los Angeles Raiders	Los Angeles, California
Los Angeles Rams Football Co., Inc., a Delaware corporation	Los Angeles Rams	Anaheim, California
Miami Dolphins, Ltd., a Florida limited partnership	Miami Dolphins	Miami, Floirda
Minnesota Vikings Football Club, Inc., a Minnesota corporation	Minnesota Vikings	Minneapolis, Minnesota
KMS Patriots, L.P., a Delaware limited partnership	New England Patriots	Boston, Massachusetts

NFL Member Club	Team Name	Principal Place of Business
The New Orleans Louisiana Saints Limited Partnership, a Texas limited partnership	New Orleans Saints	New Orleans, Louisiana
New York Football Giants, Inc., a New York corporation	New York Giants	East Rutherford, New Jersey
New York Jets Football Club, Inc., a Delaware corporation	New York Jets	New York, New York
The Philadelphia Eagles Football Club, Inc., a Delaware corporation	Philadelphia Eagles	Philadelphia, Pennsylvania
B & B Holdings, Inc., an Arizona corporation	Phoenix Cardinals	Phoenix, Arizona
Pittsburgh Steelers Sports, Inc., a Pennsylvania corporation	Pittsburgh Steelers	Pittsburgh, Pennsylvania
The Chargers Football Company, a California limited partnership	San Diego Chargers	San Diego, California
The San Francisco Forty-Niners, Ltd., a California limited partnership	San Francisco Forty-Niners	San Francisco, California
The Seattle Professional Football Club, a Washington limited partnership	Seattle Seahawks	Seattle, Washington
Tampa Bay Area NFL Football, Inc., a Florida corporation	Tampa Bay Buccaneers	Tampa Bay, Florida

9. Defendant National Football League ("NFL") is an unincorporated association of the twenty-eight member Clubs. The NFL maintains its principal place of business at 410 Park Avenue, New York, New York.

GENERAL ALLEGATIONS

10. All of the above-named Defendants are engaged in interstate commerce and all of the Club Defendants

are competitors in the market for the services of professional football players.

11. The NFL is and has been, at least since 1987, the only major professional football league in the United States. The NFL has been adjudicated to have monopoly power to control prices and to exclude competition from the major professional football market.

12. The member Clubs of the NFL have agreed among themselves to adopt and be bound by the terms and provisions of the NFL Constitution and By Laws ("NFL Constitution"). The Clubs have authorized the Commissioner of the NFL to oversee compliance with the provisions of its Constitution and to punish Clubs which violate its provisions.

13. On March 22, 1989, the member Clubs of the NFL, upon the recommendaton of the NFL's combined Long-Range/Finance Committee, adopted an amendment to the NFL Constitution: 1989 Resolution G-2, a copy of which is attached hereto as Exhibit A. This resolution authorized the member Clubs to establish on or after 4:00 p.m. on September 5, 1989, "a Developmental Squad of up to six players by signing free agents to special services contracts of no more than $—— per week."

14. On or about June 30, 1989, the NFL Clubs agreed among themselves to utilize a uniform contract form entitled "NFL Developmental Squad Player Contract," which fixed at $1,000 per week the price that all Clubs would pay for Developmental Squad players' services. (A copy of that form contract is attached hereto as Exhibit B.) Under the terms of the form contract, each executed agreement was required to be submitted to the NFL Commissioner, who was authorized to disapprove any nonconforming agreement.

15. Each Plaintiff was required to and did execute the NFL Developmental Squad Player Contract which provided for payment at the flat rate of $1,000 per week

of the NFL season during which each Plaintiff was on the Developmental Squad. This rate is far below the fair market value of the services of Plaintiffs and other Developmental Squad players. Moreover, this rate—effectively $16,000 per Season or year—is well below the $60,000 per Season minimum previously paid by NFL Clubs to such players.

16. As a result of Defendants' agreement among themselves, there was no price competition among the Clubs for the services of Plaintiffs and members of the Plaintiff-class. Developmental Squad players were to be paid and actually were paid the identical sum for their services, regardless of which Club signed them and regardless of their individual skills and talent.

17. Notwithstanding the fixed price paid by each Club for the services of each Developmental Squad player, the Clubs recognized the different intrinsic value of each player's services as being far in excess of the $1,000 per week amount actually paid to Plaintiffs. Under the League's constitutional amendment establishing the 1989 Developmental Squads and the form contract developed by the League, the Clubs were not restrained from negotiating a salary to be paid to Developmental Squad players in the event they were activated. Defendant Clubs did, in fact, agree to pay salaries from $60,000 to over $150,000 to various Plaintiffs and members of Plaintiff-class, $3,000 to $9,000 more per week than Plaintiffs and members of Plaintiff-class were actually paid.

18. In an open and competitive market—one not restrained by the NFL's Constitution and its uniform $1,000 per week price-fixing mechanism—Plaintiffs could have contracted for and received seasonal salaries between $45,000 and $160,000 per-player greater than the amounts they were actually paid during the 1989 Season.

19. Neither the concept of a Developmental Squad, nor the Developmental Squad Contract, nor the fixed $1,000 price the Clubs agreed among themselves to pay

to players who signed such contracts was ever contained in any collective bargaining agrement or any labor agreement of any kind. Moreover, neither the establishment of the Developmental Squad, nor the fixed price Defendants agreed among themselves to pay to players signed to Developmental Squad contracts, was ever approved or authorized by any collective bargaining representative for the players.

20. During the 1989 Season, Defendant Clubs executed well over two hundred (200) Developmental Squad contracts with various players. Pursuant to their agreement among themselves, the price paid by the Clubs for the services of each and every Developmental Squad player was $1,000 per week.

CLASS ACTION ALLEGATIONS

21. This Complaint is filed as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The claims of the Named-Plaintiffs are common and typical of those of the class, which is defined as follows:

> All professional football players who signed a Development Squad contract with an NFL Club and were paid a fixed price for their services pursuant to such a contract.

Plaintiffs will fairly and adequately represent the interests of the class which includes over two hundred (200) Developmental Squad players, located throughout the United States, the joinder of whom would be impracticable.

22. The issues of law and fact common to Named-Plaintiffs and the class include the following:

(a) whether each Defendant participated in the price-fixing scheme alleged herein;

(b) whether the Defendants' price-fixing agreement constituted a *per se* violation of the antitrust laws;

(c) whether Defendants' price-fixing agreement was contained in any labor agreement;

(d) whether, as a result of Defendants' violations of the antitrust laws, the members of the class were injured in their busines and property;

(e) whether the measure of damages each class member should recover from Defendants is the (trebled) differential between the amount a Club voluntarily agreed a player's services were worth per week and the fixed-price of $1,000 that was actually paid to each player; and

(f) whether Defendants' conduct should be enjoined.

23. The foregoing issues predominate over any questions affecting only individual players, and a class action is superior to other available methods, if any, for the fair and efficient adjudication of this controversy.

24. Prosecution of separate actions by members of the class would create a risk of inconsistent adjudications with respect to individual members of the class, which would establish varying and incompatible standards of conduct for the Defendants. Adjudication of Plaintiffs' claims would, as a practical matter, be dispositive of claims of members of the class. Defendants have, moreover, acted and refused to act on grounds common to all members of the class, making declaratory and injunctive relief appropriate with respect to the class as a whole.

VIOLATIONS OF THE SHERMAN ANTI-TRUST ACT

25. By virtue of the foregoing, Defendants have engaged in a contract, combination, and conspiracy in unreasonable restraint of interstate commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

26. As a result of the foregoing contract, combination, and conspiracy among the Defendants to fix the prices to be paid by all Clubs for the services of highly

skilled professional athletes at $1,000 per week, Plaintiffs and members of the Plaintiff class have been deprived of the opportunity to market their services in a free and open market and have been injured and damaged in their business and property for which they are entitled to recover treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15.

27. Defendants' violations of the antitrust laws are continuing, and Plaintiffs accordingly seek permanent injunctive relief under Section 16 of the Clayton Act, as amended, 15 U.S.C. § 26, including an order which *inter alia* prevents reprisals or retaliation by Defendants against them and members of the class, enjoins similar future violations, and restores all rights Plaintiffs and members of the class would have enjoyed but for Defendants' violations of the antitrust laws.

WHEREFORE, Plaintiffs pray for the entry of orders and a judgment:

(a) Certifying this case as a class action under Rule 23 of the Federal Rules of Civil Procedure;

(b) Declaring that the price-fixing conduct of the Defendants violates the Sherman Act;

(c) Permanently enjoining Defendants from engaging in price-fixing for the services of professional football players;

(d) Declaring that all contracts between Plaintiffs and members of plaintiff-class and any NFL clubs are voidable at the option of the individual player, who shall thereafter be permitted to contract with any NFL Club;

(e) Enjoining Defendants from retaliation or punishment or group boycott of any Named-Plaintiff or class member for instituting, prosecuting, testifying, or participating in this action;

(f) Awarding to Plaintiffs and members of plaintiff-class damages for Defendants' violations of the Sherman

Act, such damages to be trebled pursuant to the Clayton Act;

(g) Awarding to Plaintiffs their litigation costs and expenses and attorneys' fees; and

(h) Granting such other relief as the Court deems just and appropriate.

Respectfully submitted,

/s/ Joseph A. Yablonski
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Attorneys for Plaintiffs

JURY DEMAND

Plaintiffs demand a jury trial of all damage claims.

/s/ Joseph A. Yablonski
JOSEPH A. YABLONSKI

EXHIBIT A

WEDNESDAY MORNING, MARCH 22

The meeting reconvened in Executive Session: The combined Long Range/Finance Committee recommendations were reviewed and the following action was taken:

1989 RESOLUTION
G-2

RESOLVED, that appropriate sections of the NFL Constitution and Bylaws be amended to reflect the following:

1. Effective from passage of this resolution until June 1, 1989, clubs will be limited to a year-round roster limit of 90 players and thereafter will be limited to a year-round roster limit of 80 players on the following combined lists: Active, Inactive, Reserve/Injured, Reserve/Physically Unable to Perform, Reserve/Non-Football Illness/Injury, Reserve/Suspended, Developmental Squad, Exempt, and Future. The 80-player limit will not include any players on the following lists: Reserve/Retired, Reserve/Did Not Report, Reserve/Left Squad, Reserve/Military, unsigned draft choices, unsigned Veteran Free Agents, Unprotected players, and players who have been declared ineligible to participate (suspended) by the Commissioner.

2. Clubs will be required to reduce their Active Lists to 60 players by 4 p.m., New York time, on the Tuesday after the third pre-season weekend and to 47 players by 12 noon, New York time, on the Monday before the first regular season game. (For 1989, the applicable dates are Tuesday, August 29, for the cut to 60 and Monday, September 4, for the cut to 47).

Clubs must declare an Active List of 45 players and Inactive List of two players no later than one hour prior to kickoff of each game.

All waiver requests at the final cutdown will be Procedural Recall; clubs will have until 12 noon, NYT, on Tuesday to file claims.

3. After 4 p.m., NYT, on Tuesday, September 5, clubs may establish a Developmental Squad of up to six players by signing free agents to special services contracts of no more than $—— per week. Such contracts will also include a negotiated salary that the player will receive if the club subsequently decides to add the player to its Active List and signs him to an NFL Player Contract. The following will apply to the Developmental Squad:

a. Only players whose experience is designated as "R" (rookie) or "1" (first-year player) will be eligible for the Developmental Squad. (A "Rookie" is defined as a player who has not previously been under contract to a professional football team. Players who have been active in another professional football league or whose NFL experience is limited to training camp or fewer than three games on an Active List during the regular season or postseason are "first-year players.")

b. If a club signs a player on its Developmental Squad to its Active List, it must either use one of its five free activations or request procedural recall waivers. NFL Player Contracts executed with players who are subject to procedural recall waivers are subject to customary restrictions (no guarantees, no performance bonuses, etc.).

c. No player may be moved directly from a club's Active List to its Developmental Squad. Such players must first be waived and terminated, then signed to a club's Developmental Squad.

d. Clubs may not replace any injured Developmental Squad player until the club terminates him. Even if unable to practice, injured Develop-

mental Squad players will continue to count within the six-player limit.

e. Clubs are permitted to terminate a Developmental Squad player at any time by notification to the League Office, and the club may sign another player to its Developmental Squad. The League's waiver system will not apply to such termination.

4. Clubs may not sign players for their Future List until the day after the Super Bowl.

5. The following will apply to players who are placed on Reserve/Injured with "major" (four-week) injuries:

a. A player placed on Reserve/Injured prior to or concurrent with the final roster reduction may not return to his club's Active List in that season under any circumstances. Clubs may request waivers on such players at any time or retain them on their Reserve/Injured List for the rest of the season. Such players may not practice.

b. Players placed on Reserve/Injured after the final roster reduction will be eligible to return to the club's Active List after a minimum of six games, either by free activation or by procedural recall waivers. Clubs will be permitted five free activations during the regular season.

For such players, clubs will have two options: option one is to begin practice after a minimum of four weeks, and option two is to begin practice after a minimum of six weeks on Reserve/Injured.

Option One: If a player begins practice after a minimum of four weeks, the club is permitted to practice the player for a maximum of two weeks, after which it must either return him to the Active List or request waivers, unless he has

been injured; if injured, the player may be retained on Reserve/Injured, but he will not be eligible to practice or to be activated thereafter.

Option Two: If a player begins practice after a minimum of six weeks on Reserve/Injured, the player is eligible to practice for the rest of the season, but he counts against the club's Developmental Squad limit of six players.

6. Players who are placed on Reserve/Injured with "minor" (less than four week) injuries must be placed on waivers as soon as they are healthy.

Effect:

Establishes a new system of player-personnel procedures involving squad size and Reserve/Injured, and introduces a six-man Developmental Squad.

Motion by Philadelphia, second by Atlanta.

VOTE:

22-5-1 (Dallas, Los Angeles Raiders, New York Jets, Pittsburgh, Washington, No; Miami, Passed)

EXHIBIT B

THIS CONTRACT IS BETWEEN ————, hereinafter "Player," and ———— corporation (limited partnership) (partnership), hereinafter "Club" operating under the name of the ———— as a member of the National Football League, hereinafter "League," in consideration of the mutual promises made by each to the other, Player and Club agree as follows:

1. This contract covers the 19— football season, and will begin on the date of execution and end on the day after the Super Bowl game played in January 19—, unless terminated earlier as specified in Paragraph 8.

2. Club employs Player as a member of its developmental squad and Player agrees to report for and participate fully in all practices, meetings and other football activities as directed by Club. Player will not participate in any football game not sponsored by the League unless the game is first approved by the League.

3. Player grants to Club and League, separately and together, the authority to use his name and picture for publicity and promotional purposes in newspapers, magazines, motion pictures, game programs and roster manuals, broadcasts and telecasts, and all other publicity and advertising media, provided such publicity and promotion does not in itself constitute an endorsement by Player of a commercial product. Player will cooperate with the news media, and will participate upon request in reasonable promotional activities of Club and the League.

4. For performance of Player's services and all other promises of Player, including Player's promises under Paragraph 9 and 16 in the event of activation, Club will pay Player One Thousand Dollars ($1,000.00) per week, prorated on a daily basis and payable on a weekly or bi-weekly basis as Club shall choose.

5. Player represents to Club that he is and will maintain himself in excellent physical condition. Player will

undergo a complete physical examination by the Club physician upon Club request, during which physical examination Player agrees to make full and complete disclosure of any physical or mental condition known to him which might impair his performance under this contract and to respond fully and in good faith when questioned by the Club physician about such condition. If Player fails to establish or maintain his excellent physical condition to the satisfaction of the Club physician, or make the required full and complete disclosure and good faith responses to the Club physician, then Club may terminate this contract.

6. If Player is injured in the performance of his services under this contract and promptly reports such injury to the Club physician or trainer, then Player will receive such medical and hospital care during the term of this contract as the Club physician may deem necessary, and will continue to receive his weekly compensation as specified in Paragraph 4 for so long, during the season of injury only and for no subsequent period, as Player is physically unable to perform the services required of him by this contract because of such injury.

7. Any compensation paid to Player under this contract may be offset by Club against any worker's compensation award made to Player at any time because of an injury incurred in the performance of services under this contract.

8. Club may terminate this contract at any time by notifying Player and sending an NFLnet message to the Player Personnel Department of the NFL Office. The NFL waiver system will not apply to such termination. If this contract is terminated by Club and either Player or Club so requests, Player . . .

9. In the event Player is activated by Club —— its Active List at any time during the term of this contract, Player

agrees to promptly execute an NFL Player Contract with the Club covering the 19— football season, which NFL Player Contract will supersede this contract and will contain a yearly salary of $———— and such other terms and conditions as are specified in Paragraph 16 of or an attachment to this contract. Club and Player agree that if Player is activated during the term of this contract, no additional terms and conditions may be added to the NFL Player Contract at the time of execution of that contract or thereafter.

10. Players will comply with and be bound by all reasonable Club rules and regulations in effect during the term of this contract which are not inconsistent with the provisions of this contract or of any collective bargaining agreement in existence during the term of this contract. Player's attention is also called to the fact that the League functions with certain rules and procedures expressive of its operation as a joint venture among its member clubs and that these rules and practices may affect Player's relationship to the League and its member clubs independently of the provisions of this contract.

11. Player recognizes the detriment to the League and professional football that would result from impairment of public confidence in the honest and orderly conduct of NFL games or the integrity and good character of NFL players. Player therefore acknowledges his awareness that if he accepts a bribe or agrees to throw or fix an NFL game; fails to promptly report a bribe offer or an attempt to throw or fix an NFL game; bets on an NFL game; knowingly associates with gamblers or gambling activity; uses or provides other players with stimulants or other drugs for the purpose of attempting to enhance on-field performance; or is guilty of any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football, the Commissioner will have the right, but only after giving Player the opportunity for a hearing at which

he may be represented by counsel of his choice, to fine Player in a reasonable amount; to suspend Player for a period certain or indefinitely; and/or terminate this contract.

12. This contract shall be valid and binding upon Player and Club immediately upon execution. A copy of this contract together with any attachments shall be filed by the Club with the NFL Commissioner within 10 days after execution. The Commissioner will have the right to disapprove this contract on reasonable grounds, including but not limited to an attempt by the parties to abridge or impair the rights of any other club, uncertainty or incompleteness in expression of the parties' respective rights and obligations, or conflict between the terms of this contract and any collective bargaining agreement then in existence. Approval will be automatic unless, within 10 days after receipt of this contract in his office, the Commissioner notifies the parties either of disapproval or of extension of this 10-day period for purposes of investigation or clarification pending his decision. On the receipt of notice of disapproval and termination, both parties will be relieved of their respective rights and obligations under this contract.

13. Any dispute arising between Player and Club under this contract shall be resolved in accordance with the procedure called for in any collective bargaining agreement in effect at the time the event giving rise to such dispute occurs. If no collective bargaining agreement is in effect at such time, the dispute will be submitted within a reasonable time to the NFL Commissioner for final and binding arbitration by him.

14. This contract and any attachments to it set forth the entire agreement between Player and Club and cannot be modified or supplemented orally.

15. This contract is made under and shall be governed by the laws of the State of ————————.

16. The other terms and conditions of the NFL Player Contract(s) executed upon Player's activation shall be as follows:

_____

_____

_____

_____

This contract is executed this —— day of ————, 19—.

_____ _____

(Player) (Club)

_____ _____

(Address) (BY)

_____

_____

(Telephone Number)

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

ANSWER

The National Football League ("NFL") and its twenty-eight member clubs respond to the First Amended Class-Action Complaint as follows:

FIRST DEFENSE

The First Amended Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The matters complained of herein are not subject to the antitrust laws by reason of the non-statutory labor exemption to the antitrust laws.

THIRD DEFENSE

1. Answering paragraph 1 of the First Amended Complaint, defendants state that the paragraph's first sentence merely purports to characterize the basis for plaintiffs' asserted claims; it does not require a response. Defendants admit that plaintiffs are or at one time were professional football players. Defendants admit that they are the member clubs of the NFL and the League itself. Defendants admit that the NFL is now the only major professional football league operating in the United States. To the extent not specifically admitted herein, defendants deny the allegations of paragraph 1 of the First Amended Complaint.

2. Answering paragraph 2 of the First Amended Complaint, defendants state that in March 1989, defendants amended sections of the NFL Constitution and By-Laws

to introduce a six-man Developmental Squad for each club. Defendants deny the remaining allegations of paragraph 2 of the First Amended Complaint.

3. Defendants deny the allegations of paragraph 3 of the First Amended Complaint.

4. Answering paragraph 4 of the First Amended Complaint, defendants deny that this Court has subject matter jurisdiction over plaintiffs' claims for injunctive relief. *See* 29 U.S.C. §§ 101-115. Defendants admit that this Court has subject matter jurisdiction over the other claims asserted in the First Amended Complaint.

5. Defendants admit that venue is proper in this Judicial District. Defendants admit the allegations of the second, fourth and fifth sentences of paragraph 5 of the First Amended Complaint. Defendants deny the allegations of the third and last sentences of paragraph 5 of the First Amended Complaint.

6. Answering paragraph 6 of the First Amended Complaint, defendants admit that during all or part of the 1989 professional football season plaintiffs were players on the Developmental Squad of one or more NFL clubs. Defendants admit the allegations of the last sentence of paragraph 6 of the First Amended Complaint, except with regard to plaintiffs' current addresses, as to which defendants lack information sufficient to form a belief. Defendants deny the remaining allegations of paragraph 6 of the First Amended Complaint.

7. Paragraph 7 of the First Amended Complaint contains assertions that do not require admission or denial. To the extent that such a response is required, defendants deny the allegations of paragraph 7 of the First Amended Complaint.

8. Defendants deny that Green Bay Packers, Inc. operates a professional football team for profit. Defendants admit the remaining allegations of paragraph 8 of the First Amended Complaint.

9. Defendants admit the allegations of paragraph 9 of the First Amended Complaint.

10. Answering paragraph 10 of the First Amended Complaint, defendants admit that they are engaged in interstate commerce. Defendants admit that, within the context of their League joint venture and pursuant to lawfully developed and implemented employment principles, they compete in the market for the services of professional football players. Defendants deny the remaining allegations of paragraph 10 of the First Amended Complaint.

11. Defendants admit the allegations in the first sentence of paragraph 11 of the First Amended Complaint. Defendants deny the allegations of the second sentence of paragraph 11 of the First Amended Complaint.

12. Defendants admit the allegations of the first sentence of paragraph 12 of the First Amended Complaint. Defendants admit that the Commissioner of the National Football League is responsible for enforcing the NFL Constitution and By-Laws. Defendants deny the remaining allegations of paragraph 12 of the First Amended Complaint.

13. Defendants admit that on March 22, 1989, the member clubs of the NFL adopted an amendment to the NFL Constitution: 1989 Resolution G-2. Defendants admit that Exhibit A to the First Amended Complaint appears to be a copy of 1989 Resolution G-2 and that the second sentence of paragraph 13 of the First Amended Complaint accurately quotes from Resolution G-2. Defendants admit that at or about the time 1989 Resolution G-2 was passed, recommendations of the combined Long Range Planning/Finance Committee were reviewed. Defendants deny the remaining allegations of paragraph 13 of the First Amended Complaint.

14. Answering paragraph 14 of the First Amended Complaint, defendants admit that on or about June 30, 1989, the NFL prepared a draft of a form contract for

possible use in connection with various clubs' Developmental Squads. Defendants admit that Exhibit B appears to be a copy of that draft, and state that the terms of the draft speak for themselves. Defendants deny the remaining allegations of paragraph 14 of the First Amended Complaint.

15. Defendants deny the allegations of paragraph 15 of the First Amended Complaint.

16. Defendants deny the allegations of paragraph 16 of the First Amended Complaint.

17. Defendants admit the allegations of the second sentence of paragraph 17 of the First Amended Complaint. Defendants deny the allegations of the first and third sentences of paragraph 17 of the First Amended Complaint.

18. Defendants deny the allegations of paragraph 18 of the First Amended Complaint.

19. Defendants admit that no formal collective bargaining agreement addresses with specificity Developmental Squads. Defendants deny the remaining allegations of paragraph 19 of the First Amended Complaint.

20. Defendants admit that during the 1989 season, NFL clubs executed over 200 contacts with Developmental Squad players. Defendants deny the allegations of the second sentence of paragraph 20 of the First Complaint.

21. Defendants admit that plaintiffs purport to file their First Amended Complaint as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. Defendants deny the remaining allegations of paragraph 21 of the First Amended Complaint.

22. Defendants deny the allegations of paragraph 22 of the First Amended Complaint.

23. Defendants deny the allegations of paragraph 23 of the First Amended Complaint.

24. Defendants deny the allegations of paragraph 24 of the First Amended Complaint.

25. Defendants deny the allegations of paragraph 25 of the First Amended Complaint.

26. Defendants deny the allegations of paragraph 26 of the First Amended Complaint.

27. Defendants deny the allegations of paragraph 27 of the First Amended Complaint.

* * *

Defendants deny that plaintiffs are entitled to any of the relief sought in their First Amended Complaint. Defendants respectfully request that this action be dismissed; that defendants be awarded judgment in their favor; that defendants be awarded their litigation costs, expenses and attorneys' fees; and that the Court grant such other relief as the Court deems just and appropriate.

Respectfully submitted,

/s/ Gregg H. Levy
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Attorneys for Defendants
National Football League
and Its Twenty-Eight
Member Clubs

Dated: June 11, 1990

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

MOTION TO STRIKE DEFENDANTS' NON-STATUTORY LABOR EXEMPTION DEFENSE, OR FOR PARTIAL SUMMARY JUDGMENT

COME NOW, Antony Brown, *et al.*, Plaintiffs herein, and move this Court, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, to strike as legally insufficient Defendants' Second Defense asserting that "[t]he matters complained of herein are not subject to the antitrust laws by reason of the non-statutory labor exemption to the antitrust laws." (Answer, p. 1). Alternatively, Plaintiffs seek entry of partial summary judgment pursuant to Rule 56(d) in their favor on this asserted defense. In support of this motion, Plaintiffs show as follows:

1. In their First Amended Complaint, Plaintiffs alleged that the concept of a Developmental Squad and the fixed-price Defendants agreed among themselves to pay to Developmental Squad players had not been contained in any labor agreement of any kind:

> Neither the concept of a Developmental Squad, nor the Developmental Squad Contract, nor the fixed $1,000 price the Clubs agreed among themselves to pay to players who signed such contracts was ever contained in any collective bargaining agreement or any labor agreement of any kind.

(Amended Complaint, ¶ 19).

In their Answer to the foregoing, Defendants admitted as follows:

> Defendants admit that no formal collective bargaining agreement addresses with specificity Developmental Squads.

(Answer, ¶ 19)

2. Plaintiffs thereafter served the following Interrogatory on Defendants and received the following answer:

> With respect to your answer to Paragraph 19 of the Complaint which asserts that "Defendants admit that no formal collective bargaining agreement addresses with specificity Developmental Squads," state in detail:
>
> (a) Whether any informal bargaining agreement (letter agreement, initialled document or telegram, FAX, or any document of any kind) exists which refers to or reflects the consent of any bargaining representative for NFL players to the establishment of Developmental Squads in 1989, or to the payment of $1,000 per week to players on such squads, or in signing 1989 Developmental Squad Players.
>
> *ANSWER*:
>
> None.

(Defendants' Answers to Plaintiffs' Second Set of Interrogatories, No. 2)

3. The parties have also produced for the opposing parties numerous documents which indisputably state and reflect that the National Football League Players Association was presented with the League's 1989 Resolution G-2 and absolutely and unequivocally refused to accept, agree or acquiesce to any system which paid all Developmental Squad players a flat, arbitrarily low salary and prohibited such players from individually negotiating their salaries. These materials are contained in a volume of documents being filed contemporaneously with this Motion (under seal) entitled "Plaintiffs' Statement of Material Facts Not in Genuine Dispute and Supporting Exhibits."

4. As set forth in the Memorandum submitted herewith, the non-statutory labor exemption defense to an antitrust claim can only be asserted where an agreement between employers and representatives of the employees exists which contains the restraint in question. Here, no agreement of any kind—formal, informal, or otherwise—exists which contains the assent or consent of the employees to the price-fixing conduct complained of herein.

5. In light of these admissions and based upon the undisputed record, Defendants cannot, as a matter of law, defend their conduct under the non-statutory labor exemption to the antitrust laws.

WHEREFORE, Plaintiffs pray this Court to strike as legally insufficient the second affirmative defense of Defendants, or, alternatively, to enter partial summary judgment in favor of the Plaintiff class against Defendants on this issue.

Respectfully submitted,

/s/ Joseph A. Yablonski
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

Pursuant to Local Rule 108(h), Plaintiffs Antony Brown, *et al.*, submit the following statement of facts not in genuine dispute:

1. Plaintiffs and members of the plaintiff class are professional football players who signed Developmental Squad contracts with the member Clubs of the National Football League ("NFL") during the 1989 professional football season (First Amended Complaint, ¶ 6; Answer ¶ 6; Order dated July 3, 1990).

2. Defendants are the NFL itself and the member Clubs of the NFL, which are competitors in the market for the services of professional football players (Complaint, ¶¶ 8-10; Answer, ¶¶ 8-10).

3. On and before September 5, 1989 and at all other relevant times, the member Clubs of the NFL were represented for collective bargaining purposes by the National Football League Management Council, whose Executive Director was, at all relevant times, Jack Donlan.

4. On and before September 5, 1989 and at all other relevant times for purposes of this case, the players in the NFL were represented for purposes of collective bargaining by the National Football League Players Association ("NFLPA"). (After the relevant events in this case occurred, NFLPA renounced its bargaining rights; although

Defendants dispute NFLPA's renunciation of bargaining rights, the point is not material to this case because all conduct material to this case occurred prior to November 6, 1989, the date NFLPA renounced its collective bargaining rights). At all relevant times, the Executive Director of NFLPA was Gene Upshaw.

5. In 1982, the Management Council and the NFLPA entered into a five year collective bargaining agreement, which expired on August 31, 1987. (A copy of the 1982 Agreement is attached at Tab 1 hereto). The expired bargaining agreement provided certain minimum salaries for players, but authorized individual salary negotiations between players and NFL Clubs beyond those minimums, such amounts to be contained in an individually executed NFL Player Contract between each player and each Club. The NFL Player Contract form that was to be used by all Clubs in signings of all players is attached hereto at Tab 2.

6. Prior to the 1989 NFL Season, no player was permitted to practice with any NFL Clubs who had not signed an NFL Player Contract with that Club. (NFL Constitution and Bylaws, § 15.6) (Tab 3, p. 48).

7. The 1982 bargaining agreement contained no provisions with respect to developmental squads or any like category of players. Under the terms of the 1982 Agreement all players were assured the right to negotiate the salaries they were to receive. This right applied to active and inactive players, players on injured reserved or in any other status with their clubs (Tab 1, pp. 28, 50, 51).

8. The 1982 collective bargaining agreement expired on August 31, 1987. No successor bargaining agreement has been negotiated or executed by the NFLPA and the NFL Management Council.

9. On February 22-23, 1989, a meeting of the NFL's Combined Long Range Planning/Finance Committee ("LRPC") was held in New Orleans, Louisiana. The

Combined Committee was comprised of the following owners of NFL Clubs:

Club	Owner/Representative
LRPC:	
Kansas City Chiefs:	Lamar Hunt
New York Giants:	Wellington Mara
San Francisco 49'ers:	Ed DeBartolo, Jr. [did not attend]
Minnesota Vikings:	Mike Lynn
Chicago Bears:	Mike McCaskey
San Diego Chargers:	Alex Spanos
Finance:	
New Orleans Saints:	Tom Benson
Denver Broncos:	Pat Bowlen
Kansas City Chiefs:	Lamar Hunt.

The Committee adopted 1989 Resolution G-2 which provided, in relevant part, as follows:

> 3. After 4 p.m., NYT, on Tuesday, September 5, clubs may establish a Developmental Squad of up to six players by signing free agents to special services contracts of no more than $———— per week. Such contracts *will* also include a negotiated salary that the player *will* receive if the club subsequently decides to add the player to its Active List and signs him to an NFL Player Contract. The following will apply to the Developmental Squad:
>
> a. Only players whose experience is designated as "R" (rookie) or "1" first-year player) will be eligible for the Developmental Squad. (A "Rookie" is defined as a player who has not previously been under contract to a professional football team. Players who have been active in another professional football league or whose NFL experience is limited to training camp or fewer than three games on an

Active List during during the regular season or postseason are "first-year players").

b. If a club signs a player on its Developmental Squad to its Active List, it must either use one of its five free activations or request procedural recall waivers. NFL Player Contracts executed with players who are subject to procedural recall waivers are subject to customary restrictions (no guarantees, no performance bonuses, etc.).

c. No player may be moved directly from a club's Active List to its Developmental Squad. Such players must first be waived and terminated, then signed to a club's Developmental Squad.

d. Clubs may not replace any injured Developmental Squad player until the club terminates him. Even if unable to practice, injured Developmental Squad players will continue to count within the six-player limit.

e. Clubs are permitted to terminate a Developmental Squad player at any time by notification to the League Office, and the club may sign another player to its Developmental Squad. The League's waiver system will not apply to such termination.

(Tab 4).

10. In recommending the G-2 Resolution for consideration by all the NFL Owners, the Committee described the "effect" and "reason" for the Resolution as follows:

Effect:

Establish a new system of player-personnel procedures involving squad size and Reserve/ Injured, *and introduces a six-man Developmental Squad.*

Reason:

> To promote competitive equality under *fiscally responsible circumstances* while maintaining many elements of the personnel system currently in place.

(Tab 4) (Emphasis added).

11. On March 22, 1989, at an Executive Season of NFL Owners Meeting in Palm Desert, California, the Owners considered 1989 Resolution G-2. Minutes of the meeting reflect no discussions on the Resolution, except that the Motion to adopt was made by Philadelphia, seconded by Atlanta, and passed by a vote of 22-5-1 (Dallas, Los Angeles Raiders, New York Jets, Pittsburgh and Washington voting "no"; Miami passed.) (Tab 5).

12. On April 7, 1989, NFL Management Council Executive Director Jack Donlan wrote to Gene Upshaw, Executive Director of NFLPA enclosing a copy of the G-2 Resolution, stating that "The Management Council desires to negotiate with your union on the terms and conditions applicable to developmental squad players." (Tab 6).

13. On April 26, 1989, NFLPA General Counsel Richard A. Berthelsen had a telephone conversation with Management-Council General James Conway concerning the Developmental Squad. (No agreement of any kind was reached during that discussion. Berthelsen's handwritten notes and Conway's typewritten letter concerning their discussion which confirms this fact are attached at Tab 7.)

14. On May 17, 1989, members of the Management Council Executive Committee, which included the Owners of the NFL's Tampa Bay, Phoenix, Cincinnati, New York Giants, Miami and Pittsburgh teams met and agreed among themselves that the salary to be paid to Developmental Squad players would be $1,000 per week. (Tab 8).

15. On May 18, 1989, Donlan again wrote to Upshaw requesting bargaining over the Developmental Squad and specific changes in the expired 1982 bargaining agreement, including the following:

> "2. Article XXII, *Salaries,* shall not apply. In lieu thereof, establish special services contract providing for salaries of $1,000 per week, prorated on a daily basis.
>
> 3. Article XXVIII, *Post-Season Pay,* shall not apply."

(Tab 9).

16. On May 30, 1989, Uphaw replied to Donlan's letter of May 18th, stating in part:

> The NFLPA is willing to agree that players can be listed on a developmental squad of an NFL club if they have all of the benefits and protections which players on the Active List have. *This, of course, would include the right to negotiate their own salaries.*
>
> Article XIX of the 1982 CBA so provided with regard to players on the Inactive List, and that concept seems to apply to developmental players as well.

(Tab 10).[1]

17. Donlan relayed Upshaw's letter to the Members of the Management Council Executive Committee (Tab 11).

---

[1] Article XIX in the 1982 Collective Bargaining Agreement ("CBA") to which Upshaw referred, stated:

> Section 3. Inactive List: For the 1982 regular and post season there will be an Inactive List of 4 players per club. For the 1983, 1985 or 1986 regular season, the clubs may determine to have an Inactive List limit of any number of players per club. Inactive List players shall receive the same benefits and protections as Active List players.

(Tab 1, p. 47).

18. On June 16, 1989, Donlan, James Conway, and Dennis Curran of the Management Council met with Upshaw and NFLPA attorney Tom DePaso. Donlan immediately informed his Executive Committee that no agreement had been reached with NFLPA concerning the fixed wages to be paid to Developmental Squad players:

> *Gene* indicated he fully understood the developmental squad but *could not agree to any arrangement that eliminated the right of any player to negotiate his individual salary. Upshaw said that* no matter what salary level we proposed to pay developmental players, whether it was our $1,000 weekly or a higher number, *the union would not "in principle" permit two classes of players to exist, one with individual bargaining rights and one without.* For implementation purposes, the issue is clearly at impasse.

(Tab 12) (Emphasis added). The handwritten notes of Upshaw and DePaso concerning this meeting also confirm this point. (Tabs 13 and 14).

19. On June 30, 1989, Donlan sent Upshaw a copy of the Developmental Squad contract the Clubs intended to use. (Tab 15). On that same date, Donlan wrote a memo to "file" relating that he and Upshaw had discussed in 1985 the hiring of 4 players by each club at $400-$500, but stating that Upshaw was now "unalterably opposed" to denying any players the right to individually negotiate their contracts. (Tab 16)[2].

---

[2] **The Defendants have produced the minutes of a 1985 meeting of the NFL Owners which reflect that no agreement was reached on this issue in 1985:**

> **Jack Donlan was introduced and said he had been contacted during the morning by Gene Upshaw of the NFLPA, who was willing to discuss non-union practice players with the Competition Committee as a result of Wednesday's action on the player limit.**
>
> **After discussion, a show of hands indicated that 15 clubs opposed pursuing the issue and the matter was dropped.**

(Tab 17).

20. On July 6, 1989, Upshaw sent by FAX a letter to Donlan reiterating NFLPA's opposition to "a fixed wage of $1,000 per week":

> I am writing to confirm our discussions on Friday, June 16, 1989 concerning the above subject. You told Tom DePaso and me that you wanted to sign developmental squad players to a standard form contract (yet to be developed) and pay them all a fixed wage of $1000 per week. You further stated that a player being placed in the developmental category would have to sign an NFL Player contract for a multi-year term. Once on developmental, you also stated that the player would be committed to the club for the balance of the year in question, except that the club could terminate the developmental player at any time for any reason.
>
> Tom and I rejected these conditions. *We stated that all players, including developmental, should have the right to negotiate salary terms, and that no fixed wage for any group of players is acceptable to the NFLPA.* Also, we are against restricting a player to one team if he can be an Active player with another. Moreover, it is our position that all players are entitled to full benefits, whether they are Active or in some other category.

(Tab 18) (Emphasis added).

The balance of Upshaw's letter dealt with the June 16 discusion of "free agency" for other players and arranging a future meeting concerning that issue. (Tab 18, ¶¶ 3, 4).

21. On July 7, 1989, Donlan wrote to Upshaw, taking sharp issue with Upshaw's description of the free agency discussions, but never disputing the paragraphs quoted above in paragraph 20. (Tab 19). Donlan also copied his Executive Committee concerning this exchange. (Tab 20).

22. On July 28, 1989, the NFL office sent to all NFL clubs Memo PP-82-89 which contained Questions and Answers concerning G-2 (Tab 21).

23. On August 14, 1989, Management Council General Counsel James E. Conway forwarded to Upshaw a copy of the Developmental Squad Contract (with corrected typographical errors) that the Clubs intended to use for such signings. (Tab 22). This document with its flat sum of $1,000 per week was, in fact, used by all Clubs in signing Developmental Squad players (Amended Complaint, ¶¶ 14, 20, Exhibit B; Answer, ¶¶ 14, 20).

24. On August 22, 1989, the Management Council drafted and sent Memo MC 89-17 to Club officials regarding Developmental Squad players, which stated, in part:

> "Weekly compensation to be paid to Developmental Squad Players is $1,000. Individually negotiated terms above or below $1,000 are not permitted."

(Tab 23).

25. On August 24, 1989, then NFL Commissioner Pete Rozelle issued Memo PP-92-89 to all NFL Clubs concerning compensation of Developmental Squad players and threatening to discipline any Club that provided any direct or indirect compensation to Developmental Squad players beyond $1,000 per week, including the loss of draft choices:

> 2. All signings must be on the Developmental Squad contract, which was previously provided to you. All players on the Developmental Squad will be paid a salary of $1,000 per week. *Any other direct or indirect compensation provided to Developmental Squad players is impermissible,* and *clubs violating this provision will be subject to appropriate discipline, including the loss of draft choices.*

(Tab 24).

26. On August 31, 1989, NFL Commissioner Rozelle sent another Memo (PP-96-89) to General Managers and Player Personnel Directors of all NFL Clubs stating the following timetable for Roster cuts and Developmental Squad signings:

- Clubs must make final roster cuts by 12:00 noon on 9/4/89.
- League notifies other Clubs of waivers at 4:00 p.m. 9/4/89.
- Other Clubs can claim Players by noon 9/5/89.
- Clubs can sign Players to Developmental Squad contracts after 4:00 p.m., 9/5/89.

(Tab 25).

27. On September 1, 1989, in another Memo to all NFL Clubs (PP-108-89), NFL Commissioner Rozelle remined them that the terms of NFL Player Contracts negotiated (but not executed) simultaneously with player's signing of Developmental Squad contract could be changed even if the player was terminated and later re-signed.

(Tab 26).

28. On September 4, 1989, at 3:41 p.m., four hours after all Clubs were to have informed the League office of their final roster cuts and nineteen minutes before such players could be signed by other Clubs, New England Patriots General Manager Pat Sullivan wired every other NFL Club General Manager threatening to file "tampering charges" for contacting agents of New England players to join their developmental squads. (Tab 27).

29. Also on September 4, 1989, Commissioner Rozelle again notified all NFL Clubs (Memo PP-109-89) that no benefit or compensation of any kind, other than $1,000 per week, could be paid or given to Developmental Squad players:

"Clubs are specifically reminded that they were notified in Management Council Memo MC89-17 that "weekly compensation to be paid to Developmental Squad Players is $1,000. Individually negotiated terms above or below $1,000 are not permitted."

This means that *Developmental Squad players may not receive any other compensation or benefit from the club, directly or indirectly, in any form. Housing arrangements, per diem, and any other form of compensation or benefit are impermissible.*

(Tab 28) (Emphasis supplied).

30. On September 7, 1989, Commissioner Rozelle informed the Clubs that Developmental Squad players could not dress or participate in warm-ups on game-day, but could attend and perform services on the sidelines. (Tab 29).

31. On October 12, 1989, Donlan wrote to Upshaw, stating that at a recent meeting with Detroit Lions players Upshaw had "represented that teams were violating League limitations on developmental squad salaries." (Tab 30).

32. Upshaw responded to Donlan on October 17, 1989, stating that NFLPA would not police the Clubs' "illegal salary cap for developmental squad players." (Tab 31).

33. On January 4, 1990, the NFL office sent a Memo (PP-1-90) to all Club Presidents and General Managers, which stated in part:

"Clubs participating in the playoffs are reminded, as previously indicated in Management Council Memo 89-17, dated August 22, 1989, that *Developmental Squad players are not eligible for post-season pay and that clubs are prohibited from awarding post-season compensation to such players.*"

"The *only compensation* that Developmental Squad players may receive during the playoffs *is the $1,000*

per week stipulated in their Developmental Squad contracts.

(Tab 32) (Emphasis added).

34. On March 11-15, 1990 (two months before this lawsuit was filed), at the NFL Owners' Annual meeting, the minutes reflect that five (5) different proposals to modify Resolution G-2 were rejected, including a proposal that "Developmental Squad players be free agents able to sign with any other club in the NFL." (Tab 33).

35. On June 11, 1990, all Defendants herein filed a single Answer (Tab 34) in which they admitted that "within the context" of the NFL "they compete in the market for the services of professional football players" (¶ 11) and that "no formal collective bargaining agreement addresses with specificity Developmental Squads" (¶ 19).

36. On July 24, 1990, ten weeks after this action was filed, the NFL publicly announced that there would be no Developmental Squads during the 1990 Season. (Tab 34).

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (NON-STATUTORY LABOR EXEMPTION)

Pursuant to Fed. R. Civ. P. 56(b), defendants hereby move for summary judgment in their favor on the ground that plaintiffs' antitrust claims are barred by the non-statutory labor exemption to the antitrust laws.

The non-statutory labor exemption applies to restraints in employment terms concerning mandatory subjects of collective bargaining if management adopts those terms after they have been presented to labor and bargained in good faith to impasse. In such circumstances, and if the alleged restraint does not significantly affect the product market in which the employer competes, the employees retain the full range of their labor law rights and remedies, but they are barred from raising an antitrust challenge to the new or revised terms of employment.

Here, there is no genuine dispute as to any material issue of fact necessary to invoke the non-statutory labor exemption. In particular both sides agree that the uniform salary terms for Developmental Squad players—the alleged restraint of trade challenged by plaintiffs—were adopted by the NFL only after they had been proposed to the players' certified labor representatives and bargained in good faith to impasse. As a result, summary judgment for defendants is required as a matter of law.

The legal authority supporting this motion is addressed in the accompanying memorandum of law, which also is filed in opposition to Plaintiffs' Motion to Strike Defend-

ants' Non-Statutory Labor Exemption Defense, or for Partial Summary Judgment. The authority supporting defendants' motion includes a recent decision of the United States Court of Appeals for the Eighth Circuit that is directly on point. *Powell* v. *National Football League*, 888 F.2d 559 (8th Cir. 1989), *petition for certiorari pending*, 110 S. Ct. 2583-84 (1990).

We have also filed herewith a Statement of Material Facts Not in Dispute, a response to Plaintiffs' Statement of Material Facts Not In Genuine Dispute, and a proposed Order.

Respectfully submitted,

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October 19, 1990

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

1. At all times relevant to this dispute, the National Football League Players Association ("NFLPA") was certified by the National Labor Relations Board as the exclusive collective bargaining representative of the NFL's professional football players. The NFLPA has engaged in collective bargaining with the National Football League Management Council, the collective bargaining representative of the NFL teams.

2. The alleged restraint of trade challenged by plaintiffs—uniform salary terms for Developmental Squad players during the 1989 season—were adopted by the NFL only after those terms had been proposed to the NFLPA and bargained in good faith to impasse.

3. The alleged restraint of trade challenged by plaintiffs principally affects only plaintiffs and defendants, and does not have a significant effect on the product market in which defendants compete.

Respectfully submitted,

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October 19, 1990

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

Pursuant to Local Rule 108(h), defendants set forth below their response to each fact that plaintiffs assert is material and not in genuine dispute. By not disputing an asserted fact, defendants do not agree that such fact, or the evidence offered in support thereof, is relevant, material or admissible evidence. Defendants reserve all of their rights and objections in such regards.

* * *

1. Not disputed.

2. As written, this sentence is vague and incomplete. Defendants do not dispute that, within the context of their League joint venture and pursuant to lawfully developed employment law principles, the member Clubs of the NFL compete for the services of professional football players.

3. Not disputed.

4. Defendants do not dispute the first and third sentences of this paragraph. Defendants agree that the facts asserted in the parenthetical sentence are not material to this case. As plaintiffs acknowledge, defendants dispute the first clause of the parenthetical sentence.

5. The first and second sentences of this paragraph are not disputed, except that some provisions of the collective bargaining agreement, by their terms, continue in effect after August 31, 1987. Defendants dispute the facts

asserted in the third and fourth sentences of this paragraphs because they do not accurately summarize the relevant provisions of the 1982 agreement.

6. Disputed. This paragraph does not accurately reflect the substance of the cited document.

7. Disputed. As written, the first sentence of this paragraph is vague, though defendants do not dispute that the 1982 bargaining agreement contained no specific reference to Developmental Squads. The second and third sentences do not accurately summarize the relevant provisions of the 1982 agreement.

8. Not disputed, except that some provisions of the 1982 collective bargaining agreement, by their terms, continue in effect after August 31, 1987.

9. The first and third sentences of this paragraph are not disputed, except for the fact that the original resolution did not include the underlining reflected in the pleading. With regard to the second sentence, the asserted composition of the committees and the characterization of their members are not accurate, as the cited documents confirm.

10. Defendants do not dispute that this paragraph (except for the underlining) accurately quotes from portions of the cited document.

11. Not disputed, except for the facts (1) that the meeting discussed was an Executive Session of the National Football League Annual Meeting and (2) that the minutes indicate that there was discussion of the Resolution.

12. Not disputed.

13. The first sentence is not disputed. With regard to the second and third sentences, defendants do not contend that an agreement was reached in those discussions. To the extent that those sentences assert any other facts, they are disputed.

14. Disputed. There is no evidence suggesting that any agreement was reached at the identified meeting; the cited documents confirm that "no vote was taken." Moreover, the attendees at the meeting are incorrectly identified, as the cited document confirms.

15. Disputed. The summary does not accurately reflect the substance of the cited document, although this paragraph does quote correctly from a portion of the document.

16. Not disputed, except for the facts (1) that the pleading includes underlining not reflected in the cited letter and (2) that the footnote does not quote correctly from the cited document.

17. Not disputed.

18. Not disputed, except that the characterization of the quoted document is not accurate and that the underlining is not part of the original document.

19. Not disputed.

20. Not disputed, except for the fact that the underlining is not part of the original document.

21. Not disputed.

22. Not disputed.

23. Not disputed.

24. Not disputed.

25. Except for the underlining, this paragraph accurately quotes from the cited memorandum. Defendants dispute the characterization of the memorandum's substance, including the phrase "threatening to discipline."

26. Disputed. This paragraph does not accurately quote from the cited document.

27. Disputed. This paragraph does not accurately summarize the cited document.

28. Disputed. This paragraph is inaccurate in several respects, as the cited document confirms.

29. Not disputed, except for the facts that this paragraph includes underlining not reflected in the original document and that Developmental Squad players did receive benefits other than their $1,000 per week salary.

30. Not disputed.

31. Disputed. This paragraph does not accurately quote from the cited document.

32. Disputed. This paragraph does not accurately quote from the cited document.

33. Not disputed, except for the fact that the pleading contains underlining not reflected in the original document.

34. Not disputed.

35. Disputed. This paragraph does not accurately quote from defendants' Answer.

36. Not disputed.

Respectfully submitted,

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October 19, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

COME NOW, Plaintiffs, Antony Brown, *et al.*, on behalf of the Plaintiff-Class and pursuant to Local Rule 108, and file this response to Defendants' Statement of Material Facts Not In Genuine Dispute:

1. If the phrase "[a]t all relevant times" means prior to November 6, 1989 (See Plaintiffs' Statement, ¶ 14 and Defendants' Response acknowledging that events concerning NFLPA's status which post-date November 6, 1989 are immaterial to the issues in this case), the facts in this paragraph are correct as a general matter. With respect to the specific types of employees included in certified unit, see Certification of Representation issued by the National Labor Relations Board in Case No. 18-RC-8308 (January 22, 1971).

2. Disputed. The NFL owners "adopted" an amendment to the NFL Constitution and Bylaws approving 1989 Resolution G-2 on March 22, 1989, without prior notice or bargaining with the NFLPA. This constitutional provision became binding on the Clubs and enforceable by the Commissioner on that date. The NFL thereafter presented NFLPA with this constitutional change as a *fait accompli* and sought NFLPA's approval. Before there was any formal discussion between the Clubs and NFLPA concerning the G-2 Resolution, the Clubs determined on May 17, 1989, to fix the price they would pay for the

services of Developmental Squad players at $1,000 per week. When NFLPA refused to become a party to the Clubs' price-fixing conspiracy, the Clubs nevertheless proceeded to abide by and comply with the G-2 Resolution.

3. The facts set forth in this paragraph are immaterial to the issues before the Court. Moreover, if the facts in this paragraph are material, Plaintiffs cannot state whether they agree or dispute the facts of this paragraph, because Defendants have failed to specify "the product market in which the defendants compete."

Respectfully submitted,

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Attorneys for Plaintiff-Class

Dated: October 29, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY

COME NOW, Antony Brown, *et al.*, on behalf of the certified class, and move this Court, pursuant to Rule 56, Fed. Rule of Civ. Pro., to enter summary judgment on liability in favor of Plaintiffs against Defendants. In support of this Motion, Plaintiffs show as follows:

1. Based upon the undisputed factual record, Defendants' agreement among themselves to fix the prices to be paid for the services of members of the Plaintiff-Class constitutes an unreasonable restraint of trade.

2. Defendants' conduct constitutes a clear violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

3. Plaintiffs are entitled to judgment as a matter of law.

WHEREFORE, Plaintiffs pray that judgment on liability be entered in their favor and against Defendants.

Respectfully submitted,

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Dated: December 17, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

SUPPLEMENTAL STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

Pursuant to Local Rule 108(h), Plaintiffs Antony Brown, *et al.*, submit the following statement of facts not in genuine dispute, which supplements the Statement of Facts submitted previously by Plaintiffs in support of their Motion for Summary judgment relating to Defendants' non-statutory labor exemption defense: [1]

37. During each week of 1988 and 1989 NFL Regular and Post-Seasons, each NFL Club was permitted to carry on its Roster a maximum of 45 Active and 2 Inactive players. The computer-printouts maintained by the NFL for each Club for each week of the 1988 and 1989 Seasons reflect that for virtually every week (of both Seasons) all Clubs carried the maximum number of 47 players (45+2) on their Active/Inactive Lists (Tab 44, Exhibits A and B).

38. Only those players on a Club's Active List were permitted to dress and play during each week. (NFL Constitution and Bylaws).

---

[1] The undisputed facts set forth herein accordingly begin with paragraph 37 and the Exhibits attached hereto begin with Tab 36, which supplement, respectively, the facts previously established as undisputed in connection with Plaintiffs' earlier motion concerning the non-statutory labor exemption and the Exhibits tendered in connection therewith.

39. Inactive List players were permitted to practice with their respective Clubs. Although they did not actually play during each week, Inactive List players were paid their full NFL Player Contract salaries for each such week (Clubs' Ans. to Int. Nos. 11, 12, Set II) (Tabs 37, 40).

40. During the 1988 and 1989 NFL Regular and Post-Seasons, NFL Clubs also paid the full NFL Player Contract salaries to players on each Club's Reserve/Injured ("R/I" or "IR") List. The NFL Constitution and Bylaws provided, at all relevant times, that "Players on Reserve/Injured are compensated at the full rate of their NFL Players Contracts. . . ." (Tab 3, p. 52).

41. In 1988, the NFL Constitution and Bylaws contained the following language concerning Reserve/Injured players participating in practices and other team functions:

> PARTICIPATION WHILE ON RESERVE/INJURED. *Players on Reserve/Injured may attend team meetings and participate in practice sessions with Active List players as soon as physically able to do so.* Players on Reserve/Injured are prohibited from appearing in gams, participating in game-day warm-ups with their teams, dressing in game uniforms on game-days, or representing their teams in pre-game ceremonies. Reserve/Injured players may, however, serve their clubs on the sidelines, provided they perform a necessary function connected with the game, dress in clothing issued by the club to its game staff, and display appropriate credentials under the prevailing rules covering the bench areas.
>
> * * *
>
> 4. Throughout the entire four-week period specified in Nos. 2 and 3 above [concerning players with major pre-season injuries], *the involved player must not engaged in regular practice.* He will be limited to rehabilitation workouts apart from

Active List players. *The club would be required to notify the League office* by TWX *as soon as the player resumes regular practice*, in which case the four-week "clock" would stop, and the club would have no right to place the player onto Reserve/Injured with a major injury. Of course, if a subsequent injury occurred, the procedures could be repeated.

5. *Despite the prohibition of practice* during the four-week period under No. 4 above, *if*, in the preseason or regular season, *a player goes onto Reserve/Injured under normal circumstances and his injury is documented* as four weeks or more from the date of going onto Reserve, then *such player may resume practice sessions with Active List players as soon as physically able to do so*; provided, however, that the Commissioner may, if he deems the content and date of the resumed practice to be inconsistent with the purported nature and severity of the player's injury, take such factors into account in his investigation of the case.

(Tab 3, pp. 52, 56). (Emphasis supplied).

42. During the 1988 NFL Season, the Clubs had an average of 11.36 Players on their Reserve/Injured Lists for each week of the Regular and Post-Season. (Tab 44, Exhibit C). During the 1988 NFL Season, the Clubs paid a total of $43,330,080.87 to players on Reserve/Injured status (Tab 44, ¶ 5, Exhibit D).

43. The following members of the Plaintiff Class were on Reserve/Injured status during the 1988 NFL Season and were paid by their respective Clubs the weekly salaries set forth below:

Class Members' Name	1988 Club	1988 Weekly Salary
a. Birden, J.J.	Clev. Browns	($ 3,750)
b. Brown, Henry	Buffalo Bills	($ 4,250)
c. Brown, Tony	N.Y. Giants	($ 4,688)
d. Carter, Jon	N.Y. Giants	($ 4,688)
e. Crudup, Derrick	L.A. Raiders	($ 4,375)
f. Cullity, Dave	Clev. Browns	($ 5,312)
g. Derby, Glenn	N.O. Saints	($ 2,500)
h. Ford, Bernard	Buffalo Bills	($ 6,250)
i. Henry, Thomas	L.A. Rams	($ 2,812)
j. Henry, Charles	L.A. Raiders	($ 2,500)
k. Murray, Dan	Buffalo Bills	($ 3,125)
l. Patchan, Matt	Phil. Eagles	($ 6,875)
m. Roach, Kirk	Buffalo Bills	($ 3,125)
n. Sterling, Rod	Phil. Eagles	($ 4,187)
o. Stewart, Curtis	Chicago Bears	($ 2,187)
p. Usher, Daryl	N.E. Patriots	($ 2,812)
q. VanDruten, R.	K.C. Chiefs	($ 2,812)
r. Ware, Reggie	L.A. Raiders	($ 2,375)
s. Whitaker, D.	N.Y. Giants	($ 4,250)
t. Williams, R.	S.D. Chargers	($ 2,187)

(Defs.' Answers to Int. 11, Set II).

44. In recommending adoption of the G-2 Resolution the NFL's Combined Finance/Long Range Planning Committee acknowledged a "fiscal" purpose:

> "Reason [for adoption]: To promote competitive equality *under fiscally responsible circumstances* while maintaining many elements of the personnel system currently in place."

(Tab 4, p. 5).

45. As adopted as an amendment to the NFL Constitution, the G-2 Resolution provided that certain players placed on R/I status could not practice and that others could, but would count against each Club's limit of six Developmental Squad players:

> a. *A player placed on Reserve/Injured prior to or concurrent with the final roster reduction* may not return to his club's Active List in that season

under any circumstances. Clubs may request waivers on such players at any time or retain them on their Reserve/Injured List for the rest of the season. Such players *may not practice.*

b. Players placed on Reserve/Injured after the final roster reduction will be eligible to return to the club's Active List after a minimum of six games, either by free activation or by procedural recall waivers. Clubs will be permitted five free activations during the regular season.

For such players, clubs will have two options: option one is to *begin practice after a minimum of four weeks, and option two is to begin practice after a minimum of six weeks on Reserve/Injured.*

Option One: If a player *begins practice* after a minimum of four weeks, the club is permitted to practice the player for a maximum of two weeks, after which it must either return him to the Active List or request waivers, unless he has been injured; if injured, the player may be retained on Reserve/Injured, but he will not be eligible to practice or to be activated thereafter.

Option Two: *If a player begins practice after a minimum of six weeks on Reserve/Injured, the player is eligible to practice for the rest of the season, but he counts against the club's Developmental Squad limit of six papers.*

(Tab 5, p. 2). (Emphasis supplied).

46. Representatives of the NFL Clubs acknowledged in discussions with NFLPA that a principal purpose of the G-2 Resolution was to reduce the Clubs' player-costs. On April 26, 1989, James Conway, General Counsel to the NFL Management Council told NFLPA General Counsel Richard Berthelsen that the purpose of G-2 was to reduce costs, as Berthelsen's notes reflect:

[Berthelsen]: "Express purpose?

[Conway]: A. This part & parcel of the discussion—an attempt to reduce cost in an aura [sic] of flat revenues. . . .

* * *

[Berthelsen]: Is this a way to replace P[layer]s who were previously on I/R?

[Conway]: A. Would be more comfortable in face-to-face—not going in direction of increasing costs=answer should be obvious. . . ."

(Tab 7, pp. 2-3).

On June 16, 1989, Conway again described the reasons for the Developmental Squad in a meeting with Gene Upshaw and NFLPA attorney Tom DePaso:

"League-wide salary costs of 22%. Clubs would like to reduce it."

Jack Donlan, Executive Director of the Management Council also acknowledged that by establishing Developmental Squads, the Clubs wanted to "control costs":

"These are practice players. . . We want to control costs. . . .

Donlan asserted that there were "about 12½ people on IR each year" which represented "about 25% of player costs. . . ."

(Tab 14).

47. The effect of the G-2 Resolution was to reduce markedly the number of players carried by the Clubs on Reserved/Injured status who were compensated by the Clubs at the "full rate of their NFL Player [individually negotiated] Contracts." The League's own internal analysis showed that 67 drafted players in 1989 had signed Developmental Squad contracts, a number precisely equal

to the number of drafted players in 1988 (67) who had been placed on Reserved/Injured status as of the first regular season game of each Season (Tab 44, P-12).

48. The number of Players on Reserved/Injured status, according to the League's computer printouts, dropped from 11.26 players per Club, per week in 1988 to 5.87 players per Club, per week in 1989. This fifty percent across-the-board reduction in Reserve/Injured players (who, on average, were paid over $12,000 per week during 1989) was almost fully offset by the 5.16 Developmental Squad players that each Club on average had on its payroll at $1,000 per week during the 1989 Season (Tab 44, Exhibit C).

49. A "Q&A" sheet prepared by the League confirmed that R/I players cleared to practice would be counted against the maximum number of six Developmental Squad players that each Club could carry.

> *Q. Regarding players on Reserve/Injured who are counting against my Development Squad limit of six, am I restricted to only those players who experience is "R" or "I?"*
>
> *A. No. The restriction in question applies to players who are free agents and signed to your Developmental Squad. Those players on your Reserve/Injured List who count against your Developmental Squad limit may include players who have two years or more of experience.*

(Tab 21, p. 7) (Emphasis is original).

50. The Daily Transaction Telexes sent by the Clubs to the NFL during the 1989 Season, attached hereto at Tab 43, confirm the inter-relationship and interchangeability between players on Reserve/Injured status and Developmental Squad players.

51. During the 1989 Season, the NFL issued a Player-Personnel directive (PP-112-89) to all NFL Clubs con-

cerning the game day activities of Developmental Squad players and other players not on a Club's Active List, which memo directed that all such players be treated similarly:

> Clubs are reminded that, according to League policy, players on Reserve/Injured, the Inactive List, and the Developmental Squad are prohibited from participating in game-day warmups with their teams, dressing in game uniforms on game-days, or representing their teams in pregame ceremonies. They may, however, serve their clubs on the sidelines *provided they perform a necessary function connected with the game, dress in clothing issued by the Club to its game staff, and display appropriate bench area credentials.*

(Tab 29) (Emphasis is original).

52. When Defendants were requested by way of interrogatories to show in detail the existence of price competition among the Clubs in 1989 for the services of the 235 class members, as Developmental Squad players, the Clubs admitted that they were not aware of any competition whatsoever for the services of 229 class members. As to six identified players, in which Defendants stated more than one Club had an "interest," Defendants offered no evidence of competing offers or other evidence of actual competition among themselves for these players' services. (Tab 46).

53. When Defendants were asked by Plaintiffs by way of interrogatories to show an economic pro-competitive justification for their agreement among themselves to pay a flat sum to all Developmental Squad players in 1989 and to produce documents showing a pro-competitive effect, they declined to answer the interrogatory or to produce any documents. (Tab 47).

54. In contrast to the total absence of evidence price competition for services of members of the plaintiff class

as Developmental Squad players, over 200 of the 235 class members were offered and signed NFL Player Contracts for the 1990 NFL Season, according to computerized "Player Profiles" produced in discovery by the NFL. (Tab 48, ¶ 2). These "Player Profiles" show that members of the class received more than $3.3 million in 1990 signing bonuses alone, and that 139 class members entered into NFL Player Contracts providing potential compensation of $100,000 or more for the 1990 Season. *Id.* Twelve (12) class members signed 1990 contracts providing for signing bonuses and base salaries of more than $250,000; seven (7) class members signed agreements providing for payments of between $225,000 and $250,000; while another nine (9) reached agreements providing for total payments between $200,000 and $225,000. Thirty-five (35) players signed agreements containing base salary and bonuses of between $150,000 and $200,000. (Tab 48, ¶ 3).

55. Not all of the class members who signed 1990 NFL Player Contracts made the Rosters of NFL Clubs. As of October 1, 1990, the date of the "Player Profiles," fifty-four (54) class members were listed by the NFL as Active, and twenty-six (26) were listed on Reserve/Injured or Reserve/Physically Unable to Perform. Others have been signed to 1990 Practice Player Contracts. Excluding bonuses, the average base salary currently being received by class members under NFL Player Contracts exceeds $115,000 for the 1990 Season. (Tab 48, ¶ 4).

Respectfully submitted,

/s/ Joseph A. Yablonski
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UNITED STATES DISTRICT COURT
OF THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

NOTICE OF FILING

To: Gregg H. Levy
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044

PLEASE TAKE NOTICE, that Plaintiffs have filed with the Clerk the attached Amended Declaration of Maxwell Clifford Cohen (with Amended Exhibits), which supersedes and replaces the Original Declaration of Maxwell Clifford Cohen, which appears at Tab 44 of Plaintiffs' Supplemental Statement of Material Facts Not In Genuine Dispute and Supplemental Exhibits (Volume II), filed on December 17, 1990.

Respectfully submitted,

/s/ Joseph A. Yablonski
JOSEPH A. YABLONSKI
Bar No. 91777
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Attorneys for Plaintiff Class

UNITED STATES DISTRICT COURT
OF THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

AMENDED DECLARATION OF MAXWELL CLIFFORD COHEN

Under penalty of perjury, Maxwell Clifford Cohen declares and states as follows:

1. I hold a B.A. from the Colorado College and a J.D. from the George Mason University School of Law (May, 1990). I presently reside at 2104 N. Brandywine Street, Arlington, Virginia 22207.

2. I signed a Declaration which was filed with the Court on December 17, 1990, to which were appended a number of Exhibits. Prior to my deposition (which was taken on January 4, 1991), and since then, I have become aware that in reviewing thousands of numbers and in making various arithmetical calculations that some transpositions and other minor inaccuracies were contained in the Exhibits and in my original Declaration. I have since rechecked my figures and file herewith this amended Declaration and amended Exhibits. Because most of the data were calculated as averages per Club, per week, the minor errors I have found have virtually no impact on the final figures contained in the Exhibits.

3. In October and November of 1990 and again in January, 1991, under the direction of Joseph A. Yablonski, I reviewed and analyzed several thousand pages of computer printouts produced by the National Football League in this litigation containing the rosters of the member Clubs of the National Football League for each week of the 1988 and 1989 Regular and Post-Seasons.

I recorded the number of players listed on each Club's Active, Inactive and Reserve/Injured lists for each week in Exhibits A and B attached hereto.

4. At the direction of Mr. Yablonski, I then determined the average number of players carried by each Club on its Reserve/Injured lists for the 1988 and 1989 Seasons, which covers the periods before and after the NFL implemented its G-2 Constitutional amendment providing for the establishment of Developmental Squads. The data, which is contained in Exhibit C attached hereto, reflect that in 1988 (when there were no Developmental Squads) the Clubs carried an average of 11.26 players on their Reserve/Injured Lists during each week of the Season. In 1989, the average number of players on Reserve/Injured Lists for each week during the Season dropped to 5.89, but this number was augmented by the number of Developmental Squad players each Club carried, which averaged 5.16 players per week. The total number of players in these two categories was 11.05 players per week, per team in 1989.

5. Since I prepared my original Declaration in this case, I have been shown a document by the Defendants which counts the number of Players on Reserve/Injured Status for the years 1977 through 1989, which appears at P-16 of Tab 45 of Volume II of Exhibits. Although the NFL's chart covers only the Regular Season, (while my calculations on Exhibits A, B and C include Reserve/Injured player-weeks during both the Regular and Post-Season), I have determined that the NFL's figures are within hundredths of a decimal point on my totals. Thus, when the 1988 and 1989 columns on P-16 (Tab 45) are added they yield 5,073 and 2,647, respectively. Dividing these totals by 28 Clubs and 16 weeks yields an average number of Reserve/Injured players per Club, per week of 11.32 in 1988 and 5.91 in 1989, which is within 6/100's of my figure of 11.26 R/I players, per Club, per week,

during the 1988 Season and 2/100's of my figure of 5.89 for 1989 Season.

6. I was also requested to review and analyze over four hundred pages of interrogatory answers filed by the NFL Clubs containing the weekly salaries paid during each week of the 1988 and 1989 Seasons to players on Injured Reserve status and the Amended Answers to these Interrogatories which were served on December 12, 1990. I totalled the amounts paid by each Club to such players and then divided that amount by the total number of weeks that Injured Reserve players had been paid by each Club, as reflected in the Clubs' Amended Interrogatory Answers. These figures are contained on Exhibit D attached hereto and reflect that the average weekly salary paid by the Clubs to Reserve/Injured players was over $8,000.00 during the 1988 Season and the average was over $13,000.00 during the 1989 Season.

7. Exhibit D also contains the total amounts paid by all Clubs to Reserve/Injured players in 1988. The data contained in this Exhibit is derived from the Clubs' Amended Answers to Interrogatory 11, Set II. As set forth in Column 2 of Exhibit D, the total amount paid by the Clubs to Reserve/Injured players in 1988 was $43,324,410.99.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

/s/ Maxwell Clifford Cohen
MAXWELL CLIFFORD COHEN

EXHIBIT C

NATIONAL FOOTBALL LEAGUE

Club	Regular and Post-Season 1988			Regular and Post-Season 1989				
	Weeks of Play	Total R/I Player Weeks	Average No. of R/I Players Per Week	Weeks of Play	Total R/I Player Weeks	Average No. of R/I Players Per Week	Total Dev. Squad Player Weeks	Average No. of Dev. Squad Players Per Week
Atlanta Falcons	16	257	16.06	16	70	4.38	81	5.06
Buffalo Bills	18	273	15.17	17	152	8.94	99	5.82
Chicago Bears	18	175	9.72	16	62	3.88	79	4.94
Cincinnati Bengals	19	187	9.84	16	82	5.13	65	4.06
Cleveland Browns	17	172	10.12	18	104	5.78	107	5.94
Dallas Cowboys	16	165	10.56	16	134	8.38	87	5.44
Denver Broncos	16	172	10.75	19	88	4.63	112	5.89
Detroit Lions	16	177	11.06	16	97	6.06	60	3.75
Green Bay Packers	16	236	14.75	16	70	4.38	89	5.56
Houston Oilers	18	194	10.78	17	23	1.35	96	5.65
Indianapolis Colts	16	68	4.25	16	55	3.44	83	5.19
Kansas City Chiefs	16	169	10.56	16	113	7.06	77	4.81
Los Angeles Raiders	16	221	13.81	16	108	6.75	72	4.50

Source: National Football League Roster Printouts for each club during each week of the 1988 and 1989 seasons.

Los Angeles Rams	17	165	9.71	19	83	4.37	106	5.58
Miami Dolphins	16	126	7.88	16	171	10.69	68	4.25
Minnesota Vikings	18	98	5.44	17	77	4.53	93	5.47
New England Patriots	16	287	17.94	16	176	11.00	82	5.13
New Orleans Saints	16	148	9.25	16	27	1.69	89	5.56
New York Giants	16	254	15.88	17	86	5.06	92	5.41
New York Jets	16	237	14.81	16	155	9.69	83	5.19
Philadelphia Eagles	17	187	11.00	17	103	6.06	96	5.65
Phoenix Cardinals	16	136	8.50	16	143	8.94	73	4.56
Pittsburgh Steelers	16	91	5.69	18	41	2.28	99	5.50
San Diego Chargers	16	255	15.94	16	65	4.06	85	5.31
San Francisco 49ers	19	224	11.79	19	126	6.63	95	5.00
Seattle Seahawks	17	125	7.35	16	97	6.06	69	4.31
Tampa Bay Buccaneers	16	180	11.25	16	100	6.25	85	5.31
Washington Redskins	16	266	16.63	16	137	8.56	81	5.06
GRAND TOTAL	466	5,249	316.49	466	2,745	166.15	2,403	143.90
Averages By Club		11.26 Average per week	11.30 Wkly Avg Weighted by Club		5.89 Average Per Week	5.93 Wkly Avg. Weighted by Club	5.16 Average Per Week	5.14 Wkly Avg. Weighted by Club

EXHIBIT D

NATIONAL FOOTBALL LEAGUE

	1988 Regular and Post-Season			1989 Regular and Post-Season		
Club	Total Paid to Reserve/Injured (R/I) Players *	R/I Player Weeks *	Total Average $ Paid R/I Players Per Week	Total Paid to R/I Players	R/I Player Weeks *	Total Average $ Paid R/I Players Per Week
Atlanta Falcons	1,646,875.00	259	6,358.59	780,936.50	74	10,553.20
Buffalo Bills	1,271,778.00	262	4,854.11	1,226,600.00	159	7,714.47
Chicago Bears	1,472,760.00	165	8,925.82	985,697.00	60	16,428.28
Cincinnati Bengals	1,366,875.06	186	7,348.79	626,281.25	66	9,489.11
Cleveland Browns	1,932,125.00	172	11,233.28	1,080,427.50	104	10,388.73
Dallas Cowboys	2,264,192.00	174	13,012.60	1,164,643.75	130	8,958.80
Denver Broncos	1,760,187.50	189	9,313.16	1,550,312.50	88	17,617.19
Detroit Lions	1,981,563.00	194	10,214.24	1,168,812.50	91	12,844.09
Green Bay Packers	1,513,781.25	228	6,639.39	1,017,933.19	70	14,541.90
Houston Oilers	1,144,593.75	194	5,899.97	150,750.00	24	6,281.25
Indianap. Colts	420,499.00	68	6,183.81	325,053.00	51	6,373.59
Kansas City Chiefs	1,359,124.99	169	8,042.16	1,510,187.50	113	13,364.49
Los Angeles Raiders	2,026,281.69	237	8,549.71	2,065,637.00	111	18,609.34
Los Angeles Rams	1,254,625.25	166	7,557.98	611,500.00	80	7,643.75
Miami Dolphins	1,203,408.00	125	9,627.26	1,707,316.00	154	11,086.47
Minnesota Vikings	669,000.00	98	6,826.53	733,748.50	77	9,529.20

New England Patriots	2,430,811.50	287	8,469.73	2,553,732.68	179	14,266.66
New Orleans Saints	1,071,187.00	148	7,237.75	630,700.00	27	23,359.26
New York Giants	2,205,125.00	255	8,647.54	1,522,812.50	89	17,110.25
New York Jets	1,604,006.25	238	6,739.52	2,501,974.95	155	16,141.77
Phila. Eagles	1,649,750.00	187	8,822.19	1,536,393.40	103	14,946.44
Phoenix Cardinals	1,225,875.00	137	8,947.99	3,242,199.00	143	22,672.77
Pittsburgh Steelers	843,093.75	91	9,264.77	303,625.00	41	7,405.49
San Diego Chargers	1,891,562.50	258	7,331.64	800,625.00	66	12,130.68
San Francisco 49'ers	3,038,125.00	225	13,502.78	2,596,625.00	125	20,773.00
Seattle Seahawks	1,020,861.75	119	8,578.67	1,485,000.00	95	15,631.58
Tampa Bay Buccaneers	1,202,437.50	181	6,643.30	653,187.50	100	6,531.88
Washington Redskins	1,853,906.25	272	6,815.83	1,985,875.00	155	12,812.10
Grand Totals	43,324,410.99	5284	8,199.17	36,518,586.22	2730	13,376.77

* Clubs' Amended Answers to Interrogatory No. 11 for 1988 and No. 12 for 1989 (Tabs 37, 40).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

DECLARATION OF JOHN M. DONLAN

1. I am the former Executive Director of the National Football League Management Council ("Management Council"), and held that position from July 1980 to March 1991. The Management Council is the collective bargaining representative of the NFL clubs. I make this declaration on my own personal knowledge and am competent to testify to the matters stated herein.

2. On March 22, 1989, the NFL adopted Resolution G-2—a new package of roster rules designed to remedy competitive abuses existing under the prior roster system. Resolution G-2 contained revisions to the injured reserve rules, established a maximum roster limit of 80 players, and created Developmental Squads—units of up to six rookies or first-year players who were allowed to practice with their clubs but not play in actual games.

3. During the mid-to-late 1980's, I received and was aware of numerous complaints from clubs about competitive abuses of the injured reserve rules. In particular, clubs expressed concern about a practice known as "stashing"—*i.e.*, placing promising young players on injured reserve in order to develop them for use in an active capacity in later years. Not only did this practice prevent promising players from moving to teams that had an immediate use for their services, but it also allowed certain clubs to develop large, high-quality practice squads. Because of these effects, stashing was viewed as leading to competitive disparities between teams on the playing field. Resolution G-2 sought to remedy this situation by restricting the conditions under which IR players would

be allowed to practice, thereby reducing the likelihood that teams would choose to stash promising young players and eliminating the impact of most IR players on the quality of a club's practice sessions.

4. In order to meet the demand of NFL coaches for practice players that would not count against their active squad limits, and in order to attract the votes necessary to pass the new injured reserve rules, Resolution G-2 also contained provisions creating Developmental Squads. These squads were designed to be units of six rookie or first-year practice players that would not be allowed to play in actual games. Importantly, Resolution G-2 provided that Developmental Squad players would be paid a uniform salary, thereby helping to ensure that all clubs would retain Developmental Squad players of comparable skill. Resolution G-2 also required that only free agents could sign Developmental Squad contracts; thus, all such players had an opportunity to shop their services to all 28 NFL clubs before they could be signed to a Developmental Squad contract.

5. Two weeks after Resolution G-2 was passed, I initiated negotiations with the National Football League Players Association over implementation of the terms and conditions of employment for Developmental Squad players. Thus, on April 7, 1989, I sent a letter to the Executive Director of the NFLPA, Eugene Upshaw, requesting a meeting to discuss Developmental Squad issues. *See* Pls. Vol. I, Tab 6. On April 26, 1989, my assistant, James Conway, had a telephone conversation with Mr. Upshaw's assistant, Richard Berthelsen, about these matters. *See id.*, Tab 7. By letter dated April 28, 1989, Mr. Conway provided additional information to the NFLPA and suggested a meeting to discuss "salary and benefit levels" for Developmental Squad players. *Id.* On May 2, 1989, I mentioned to Mr. Upshaw at a hearing in Washington, D.C. that the two sides should meet to discuss these issues. *Id.*, Tab 9.

6. On May 18, 1989, I again wrote to Mr. Upshaw, this time proposing specific terms and conditions for Developmental Squad players that included "special services contract[s] providing for salaries of $1,000 per week, pro-rated on a daily basis." *Id.* The letter also suggested a meeting to discuss the pending proposals. *Id.* Mr. Upshaw finally responded by letter dated May 30, 1989, and indicated that the NFLPA would agree to the implementation of Developmental Squads only if such players were provided "the right to negotiate their own salaries." *Id.*, Tab 10. Mr. Upshaw reiterated this position at a meeting with Mr. Donlan (and others) on June 16, 1989. *Id.*, Tab 12. Further negotiations revealed that the two sides were at impasse over the uniform salary issue, *id.*, Tabs 12, 18, 19, 22, thus the League—in accordance with its rights and obligations under federal labor laws—implemented Resolution G-2 (as modified by my May 18 letter, in September 1989.

7. The proposal and eventual implementation of the $1,000 per week salary term was motivated by two primary factors. First, the Developmental Squad players were meant to be practice players. As such, these players were considered less valuable than all other NFL players, regardless of status. Since the minimum salary under the 1982 Collective Bargaining Agreement for non-active rookie players was (and is) $1,250, $1,000 per week was determined to be a reasonable wage. Second, Mr. Upshaw had previously suggested on two occasions that the League create 4-man practice squads, with each player on those squads receiving $400-$500 per week. *See id.*, Tab 16. Since Resolution G-2 doubled this proposed salary, it was again determined to be a reasonable wage.

8. The $1,000 per week salary was also important in precluding the stashing of quality players on Developmental Squads. Since this salary was appropriately pegged for practice players, those with more talent (and, hence, more marketability) were unwilling to be stashed in this

fashion. Instead, these players would hold out as free agents for a spot on a club's active roster and a commensurately higher salary. In this way, the $1,000 per week salary deterred abuses of Developmental Squads similar to those that had befallen injured reserve prior to 1989, and therefore made more effective the roster reforms contained in Resolution G-2.

9. The uniform nature of the salary term was also important in combatting the other negative aspect of "stashing"—that certain clubs were able to retain higher quality practice squads than other clubs. The uniform Developmental Squad salary eradicated this competitive disparity by ensuring that NFL teams had an approximately equal opportunity to obtain practice squads of comparable skill. Again, in this way, the uniform salary term was an essential ingredient in making effective the roster reforms contained in Resolution G-2.

10. Resolution G-2 was entirely successful in eradicating the abuses of the injured reserve rules. In addition, it offered additional employment opportunities through the Developmental Squad program to young players who otherwise would have been unable to receive any NFL experience. By providing this experience, Developmental Squads also heightened the competition for active roster spots in 1990 training camps, and thereby augmented the quality of play in the NFL.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ John M. Donlan
JOHN M. DONLAN

Dated: July 1, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

DECLARATION OF JOEL BUSSERT

1. I am Director of Player Personnel for the National Football League. In this capacity, I am primarily responsible for the monitoring and maintenance of League rules governing club rosters. I have carried out these responsibilities under my current and former titles for 15 years. I make this declaration on my own personal knowledge and am competent to testify to the matters stated herein.

2. The NFL adopted a new package of roster rules on March 22, 1989. These rules, contained in Resolution G-2, were designed to remedy a number of competitive abuses fostered by the previous system of rules—abuses that had created competitive disparities between clubs in establishing their playing squads. Thus, Resolution G-2 contained revisions to the injured reserve rules, established a maximum roster limit of 80 players, and created Developmental Squads—units of up to six rookies or first-year players who were allowed to practice with their clubs but not play in actual games.

3. A major concern addressed by Resolution G-2 was the League's injured reserve system. This system, which has been in place since the 1950's, was designed as a roster category for injured, hence incapacitated, players. If a player were injured, he could be placed on "injured reserve" ("IR") status and, though still under contract with the club and still receiving his salary, would not count against its active roster limit. In this way, teams could temporarily replace their injured players, thereby

retaining the rights to the services of these players while avoiding the competitive disadvantage of a depleted active roster.

4. Players in the injured reserve category initially were not allowed to practice. During the mid-1970's, however, NFL coaches requested that additional players be available for practices. Thus, in 1976 the League adopted a rule allowing IR players to practice if they were physically able to do so. In 1979, the League adopted a rule permitting each club to have a limited number of "free activiations"—opportunities to move players from injured reserve to the active roster. Prior to that time, a player placed on injured reserve could not return to his club's active roster for the duration of the regular season, unless the player had first been made available to all other clubs through the League's waiver system. A prime factor in fashioning these various approaches to the injured reserve category of players has always been competitive playing-field fairness to all of the member clubs, each differently situated.

5. The various rule changes regarding injured reserve during the 1970s and early 1980s had several unintended, but substantial, effects. First, some teams began to "stash" promising young players on the injured reserve list. "Stashing," which usually occurred just before the regular season began, allowed teams to retain the rights to quality players and develop them in practice without the player counting against the team's active roster. Stashing thus precluded other teams from signing these players to fill openings on their active rosters, and allowed young players or already proven veterans who would otherwise have been available to other teams—frequently weaker teams—either through waivers or as free agents.

Second, coaches began to view injured reserve as a primary source of additional practice players. Due to the increased specialization of NFL football during the 1980's and the substantial physical toll on active players due to

the longer 16-game regular season, some clubs began to rely on the injured reserve list for practice players. Thus, with the increasing number of "stashed" players filling out these injured reserve rosters, certain clubs were able to develop large practice squads.

6. As a result of these changes, and despite efforts by the League Office to avoid abuses or inequities, the number of players on injured reserve steadily increased from 1976 through 1988. In 1978, for example, the 28 NFL clubs carried a total of 216 players on injured reserve in the final week of the regular season. By contrast, in 1988, NFL clubs carried a total of 315 players on injured reserve in the final week of the season—approximately 20% of all players employed by clubs at that time. Clubs became increasingly concerned about the substantial disparities in the average number of injured reserve players retained by individual clubs. For instance, from 1985-88, several clubs carried an average of over 15 injured reserve players per week—twice as many as some other clubs.

7. In 1987 and 1988, NFL clubs expressed increasing concern about abuses of the injured reserve system and resulting competitive disparities between teams: through stashing, certain clubs were withholding quality players from the available talent pool; by retaining these players, certain clubs were able to develop squads of practice players and rest many members of their active squads. These concerns were expressed to me and to other members of the League Office staff and members of the NFL Competition Committee (composed of a limited group of NFL club officials).

8. Resolution G-2 was adopted in response to these concerns over injured reserve and particularly to combat the emergence of competitive disparities between clubs. Thus, the new package of roster rules included revisions to injured reserve that substantially restricted the conditions under which IR players would be allowed to prac-

tice. Since Resolution G-2 made it difficult for such players to practice, clubs had less incentive to stash quality players on injured reserve.

9. In the wake of these limitations, NFL coaches still wanted to hire practice players that would not be counted against their active roster limit. Thus, Resolution G-2 also contained provisions for the implementation of Developmental Squads—units of six rookies or first-year players per club that were allowed to practice but not play in actual games. Developmental Squads were a necessary compromise for the new restrictions imposed on injured reserve. In light of concerns expressed by the clubs, I do not believe that Resolution G-2 would have received the 21 votes needed to pass without the creation of Developmental Squads.[1]

10. An important element of the Developmental Squad program was the provision for a uniform salary to be paid to all players. This uniform salary term was regarded as an essential feature of the Developmental Squad program because of the concern that some teams could, for a variety of reasons, achieve a competitive advantage by continuing to stash quality players on their Developmental Squads. Because of their own perception of their skill level and marketability, players with recognized skills were less likely to choose the Developmental Squad option (and $1,000 per week) and more likely to hold out for an active roster spot (and higher compensation) with another club. Thus, the $1,000 per week salary served as an added deterrent against stashing and ensured that Developmental Squads were populated with practice players—and not with higher quality players likely to make another team's active roster.

11. The first title proposed for Developmental Squads was "Practice Squads"; it was ultimately rejected for fear that it was too demeaning. However, there was never any

[1] With Developmental Squads as part of the package, Resolution G-2 passed by a margin of 22 to 5, with one club abstaining.

question that Developmental Squad players were intended to be practice players. As such, these players were considered less valuable than all active, inactive, injured reserve, and other reserve category players. The $1,000 per week salary that was ultimately arrived at for Developmental Squad players was therefore pegged below the minimum salary earned by these other, more valuable categories of players.[2]

12. Under Resolution G-2, clubs were required to negotiate unexecuted contingent contracts with Developmental Squad players that would become effective if these players were promoted to their club's active roster. Similar contingent salary arrangements are widely used by NFL clubs as incentive for players to make the active roster. Such contracts, for example, will set one salary term for a player if he is placed in a reserve category (*e.g.*, injured reserve) and another, more substantial salary term if he makes the active list. As with these contracts, the contingent salaries offered to Developmental Squad players reflected the value of these players *as members of an active roster*. They did not reflect the value of these players' services in any other capacity.

13. Under Resolution G-2, only free agent players were allowed to sign Developmental Squad contracts. Thus, every player that eventually elected to join a Developmental Squad had a prior opportunity to seek employment (or "sell his services") as an active player with all 28 NFL clubs. Under these circumstances, the fact that a later player chose to join a Developmental Squad is indicative of his belief that this opportunity was perhaps his best chance to develop and eventually succeed as a player in the NFL.

14. The primary purpose behind Resolution G-2—and the creation of Developmental Squads—was to eliminate competitive abuses occurring under the previous

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[2] Under the 1982 Collective Bargaining Agreement, the minimum salary for inactive rookie players is $20,000, or $1,250 per week.

system of roster rules, not to replace injured reserve players with lower-price substitutes. In this, Resolution G-2 was successful. In 1989, I neither received nor learned of *any* complaints concerning the stashing of quality players. Nor am I aware of any evidence that clubs abused the new rules during the 1989 season. In sum, Resolution G-2 created a level playing field for all teams in the area of team rosters, a result crucial to the continued maintenance of competitive balance between NFL clubs.

15. In addition to helping eradicate the competitive abuses occurring under the previous year's system, Developmental Squads also offered a number of other benefits. First, they provided additional employment opportunities for a number of players who may otherwise have been unable to find employment with any NFL club. Second, because of these opportunities, young players were able to learn and develop their skills in an NFL environment. Third, Developmental Squads exposed more players to more coaches, thereby increasing the level of awareness of the available talent. Finally, given these latter two effects, some Developmental Squad players were able to compete more successfully for active roster spots in 1990 training camps. Because of these benefits, and the elimination of the problems besetting injured reserve, Resolution G-2 was clearly a superior system—both in terms of employment opportunities and competitive playing-field fairness—to what had come before.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

/s/ Joel Bussert
JOEL BUSSERT

Date: July 3, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

DECLARATION OF PAUL TAGLIABUE

1. I am Commissioner of the National Football League and have held that position since November, 1989. Prior to my appointment as Commissioner, I was an attorney in private practice representing the NFL from 1969 to 1989 in a wide variety of matters. I make this declaration on my own personal knowledge and am competent to testify to the matters stated herein.

2. The National Football League is an unincorporated not-for-profit association comprised of 28 member clubs that operate professional football teams. The joint business of the NFL and its member clubs is the successful production and marketing of professional football games as public entertainment. In advancing this business purpose, the NFL clubs do not operate as independent economic competitors, but rather as co-owners of a common business enterprise.

3. The operations of the League and the economic relationship among the member clubs are governed by agreements integrating club operations in numerous respects. These agreements are reflected in the NFL Constitution and Bylaws and resolutions and policies adopted under these Bylaws. As set forth in these agreements, the League Office, under my supervision, administers the day-to-day business affairs of the NFL. In this capacity, the League Office performs a variety of functions for the member clubs, including creating yearly game schedules, negotiating and administering the national television con-

tracts that generate the largest share of club revenues, enforcing League rules (including rules to ensure the financial stability of all clubs), marketing and promoting the League's entertainment product, and protecting the integrity of the sport. All significant business decisions of the League, from expanding the League to include additional members to changing the rules of play, are determined jointly by member club vote.

4. The business of the League is to produce and market professional football as a public entertainment product. This product—NFL football—does not consist simply of football games themselves. Instead the NFL's product consists of an annual competition of interrelated games involving all 28 member clubs. The season is structured in a way that creates exciting division and conference championship races, an eleven game post-season tournament, and, ultimately, a Super Bowl game and League champion. Because the six division champions *and* the three other teams in each conference with the best won-loss records qualify for the playoffs, each regular season game is significant to every NFL club and its fans. The interconnected nature of this "season" of NFL football, and the uncertainty of outcome and vigor of playing field competition, makes the NFL's product a highly attractive form of entertainment product. It also distinguishes the NFL's product from other forms of entertainment and other products unilaterally produced and marketed by companies in traditional, horizontally competitive industries.

5. League sports entertainment, such as is produced by the NFL, is also different from "barnstorming," in which teams do not jointly produce a common product and usually make their own scheduling arrangements. Each game of this kind is an independent event, separate from and unrelated to all other contests. In the NFL, however, no single NFL club produces or could produce either the NFL product or a competing entertainment product. Rather, the clubs must jointly produce their

product if it is to have its unique appeal to the public, and they are committed to presenting this product exclusively through the NFL. The NFL clubs themselves have no separate business apart from the League, and no separate product of their own to sell.

6. Among the most important of the NFL's joint production arrangements are the club's agreements with respect to revenue sharing. Over 90 percent of club revenues are derived from revenue sources shared with every other club. For example, the television rights of all NFL teams for regular season and post-season play are jointly sold to the networks by the League under terms requiring the broadcasters to televise each regular season game of each team. These television revenues are divided equally among all clubs, providing each club with an interest in ensuring that the telecasts of other teams are broadly viewed. Gate receipts are also shared. In the preseason, gate receipts are shared equally; in the regular season, after limited deductions relating to operating costs, 40 percent of the gate receipts go to the visiting team and 60 percent going to the home team. Although a slightly higher percentage is provided to the home team as an incentive for successful local business operations, sharing of gate receipts provides both the home and visiting teams with an incentive to maximize attendance. In this way, each club benefits from other clubs having full stadiums and generating large gate receipts. The clubs also share post-season revenues, as well as revenues from licensing and filming operations. These measures have the effect of evenly distributing revenues among the better-situated clubs in larger markets and less well-off clubs in smaller markets, and are an essential component of the structure that permits the NFL to operate with 28 teams in a variety of disparate economic conditions throughout the United States.

7. The expenses of the League office are shared equally by all NFL teams. Substantial promotional activities (on behalf of the NFL and the teams generally) are conducted and paid for on a joint basis. Common trademark

licensing arrangements assure uniform quality control and promote equal public acceptance of the games of each team of the League. Common filming operations are also conducted and marketed through NFL Films.

8. Because of these relationships, each NFL member club has a direct economic interest in the successful business operation of each of the other member clubs in the League. Rather than acting as traditional horizontal competitors, the member clubs of the NFL are cooperative partners in a joint business venture. No NFL club has an interest in forcing another team out of business, or in seeing it seriously weakened financially. While the clubs *are* vigorous competitors on the playing field, they act as partners in conducting their joint business operations.

9. The joint venture nature of the NFL extends to the most fundamental aspects of individual club existence. Many of the current NFL clubs were added to the League by an agreement among other clubs then in existence. The existing clubs assisted new franchises in establishing themselves as business enterprises and as successful playing field competitors by, for example, sharing substantial revenues, making players available and assisting in the negotiation of favorable lease arrangements, etc. Under certain circumstances, all NFL clubs are contractually obligated to assist in solving problems that affect individual teams. For example, if a club has a disaster affecting its playing squad, the remaining clubs—by current League rules—must jointly supply that team with replacement players. This is not business conduct ordinarily expected of, or engaged in by, ordinary business competitors.

10. The joint venture characteristics of the NFL have been recognized by numerous courts and in many cases that I was involved with as counsel to the League. *See Smith* v. *Pro Football Inc.*, 593 F.2d 1173, 1178-79 (D.C. Cir. 1978) ("The clubs operate basically as a joint venture."); *Mackey* v. *National Football League*, 543

F.2d 606, 619 (8th Cir. 1976) (the "NFL has *some* of the characteristics of a joint venture"), *cert. dismissed*, 434 U.S. 801 (1977); *WTWV, Inc.* v. *National Football League*, 678 F.2d 142, 144 (11th Cir. 1982) (NFL members operate as "co-producers of a common entertainment product"); *Mid-South Grizzlies* v. *National Football League*, 550 F. Supp. 558, 567-68 & n.22 (E.D. Penn. 1982) (" 'a league is . . . like a partnership' "), *aff'd*, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467, U.S. 1215 (1984); *see also North American Soccer League* v. *National Football League*, 670 F.2d 1249, 1251 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982) (the NFL is an "unincorporated joint venture"). These courts have simply reaffirmed the conclusions of Judge Grim, when he first recognized in 1953 that "[p]rofessional football is a unique type of business":

> Professional teams in a league . . . must not compete too well with each other in a business way. On the playing field, of course, they must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all the teams to compete as hard as they can against each other in a business way. If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably.

United States v. *National Football League*, 116 F. Supp. 319, 323 (E.D. Pa. 1953). In short, the clubs must cooperate in their busines affairs so that they can effectively sell competition on the playing field.

11. In addition to these economic relationships, the member clubs—through the League—have instituted rules designed to foster competitive balance among teams on the playing field. Competitive balance is crucial to the

popularity of the NFL's product since that product—in its most attractive and marketable form—is close, exciting contests between evenly-matched clubs that lead to hotly contested divisional and conference races. Thus, for example, the NFL's college draft, as developed and implemented since 1977 through a series of collectively bargained agreements with the National Football League Players Association ("NFLPA"), provides a mechanism to distribute equitably incoming talent by providing for the clubs' selections in an inverse order of the previous year's won-loss records. The team with the worst record in the prior year has the first selection of eligible college players. Similarly, through the League's "waiver" system, teams with the poorest records are given the first opportunity to claim players who are released from their old clubs. The League's scheduling format takes into account competitive balance in a variety of ways to ensure that all teams are playing a schedule of comparable strength. Further, the League—in conjunction with the NFLPA—has adopted a system of rules governing veteran player movement among teams. These provisions, as set forth in the first-refusal/compensation arrangements collectively bargained with the NFLPA, remain in effect to ensure that the best or wealthiest franchises are not able to hire all of the League's best veteran players and thereby create competitive imbalance throughout the League.

12. As more fully set forth in the accompanying Declaration of Joel Bussert, the League's roster and player eligibility rules—including Resolution G-2—are another example of the arrangements agreed to by member clubs for the purpose of promoting competitive balance.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Paul J. Tagliabue
PAUL J. TAGLIABUE

Date: July 5, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

DEFENDANTS' RESPONSE TO PLAINTIFFS' SUPPLEMENTAL STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

Pursuant to Local Rule 108(h), defendants set forth below their response to each fact that plaintiffs assert in their Supplemental Statement is material and not in genuine dispute. By not disputing an asserted fact, defendants do not agree that such fact, or the evidence offered in support thereof, is relevant, material or admissible evidence. Defendants reserve all their rights and objections in such regards.

* * * *

37. Not disputed.

38. Not disputed, if by "dress and play," defendants refer to each week's game.

39. Defendants do not dispute the first sentence of this paragraph. Defendants do dispute the second sentence, to the extent that it asserts that each NFL player listed as inactive for a given week received the same salary for that week that he would have received if he had been listed as an active player.

40. Defendants dispute the first sentence of this paragraph to the extent that it asserts that each NFL player listed as reserve/injured ("IR") for a given week received the same salary that he would have received had he been listed as an active player for that week. Defendants do not dispute the second sentence of this paragraph.

41. Aside from typographical errors and edded emphasis in plaintiffs' recitation of the NFL's Constitution and Bylaws, defendants do not dispute that this paragraph quotes accurately from the NFL Constitution and Bylaws.

42. Defendants dispute this paragraph, which fails to report accurately the figures cited at Tab 44, Exhibit C, and which reflects figures with which defendants disagree.

43. Aside from an inaccurate juxtaposition of player names and team names, defendants do not dispute this paragraph.

44. Aside from the addition of bracketed phrase and emphasis, defendants do not dispute that this paragraph accurately quotes a portion of a document containing the recommendation of the Committee. Defendants do, however, dispute plaintiffs' characterization of the purpose of Resolution G-2.

45. Aside from certain typographical errors, and added emphasis, defendants do not dispute that this paragraph quotes accurately from a portion of Resolution G-2.

46. Defendants dispute the assertion that "a principal purpose of the G-2 Resolution was to reduce the Clubs' player-costs." Defendants dispute the remainder of this paragraph, which is hearsay.

47. Defendants dispute the first sentence of this paragraph. Defendants do not dispute the second sentence of this paragraph.

48. Defendants dispute the figures cited in the first sentence of this paragraph, which reflects calculations with which defendants disagree. Defendants dispute the second sentence of this paragraph.

49. Aside from certain typographical errors and added emphasis, defendants do not dispute that this paragraph quotes accurately from a "Q&A" sheet concerning Resolution G-2.

50. Defendants do not dispute that Tab 43 contains memoranda that NFL clubs sent to the League Office in 1989 concerning additions and subtractions from their developmental squad and injured reserve lists. To the extent that this paragraph asserts any other facts, they are disputed.

51. Defendants do not dispute that this paragraph quotes accurately from pp-112-89, a Player-Personnel directive sent to all NFL clubs concerning game day activities.

52. Defendants dispute this paragraph, which mischaracterizes defendants' discovery responses.

53. Defendants dispute this paragraph, which mischaracterizes defendants' discovery responses.

54. Defendants dispute this paragraph, which reflects calculations with which defendants disagree.

55. Defendants do not dispute the first three sentences of this paragraph. Defendants dispute the fourth sentence of this paragraph, which is not supported by the material located at Tab 48, Paragraph 4.

Respectfully submitted,

/s/ Richard W. Buchanan
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GREGG H. LEVY
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National Football League and
Its Twenty-Eight Member Clubs

[Filed Sep. 2, 1992]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

MEMORANDUM OPINION AND ORDER

This case comes before the court on NFL Defendants' Motion for Reconsideration or, in the Alternative, Certification for Interlocutory Review of this Court's Memorandum Opinion of March 10, 1992 (Defendants' Motion); Plaintiffs' Opposition to NFL Defendants' Motion for Reconsideration or, in the Alternative, Certification for Interlocutory Review (Plaintiffs' Opposition); and NFL Defendants' Reply Memorandum in Support of Motion for Reconsideration or, in the Alternative, Certification for Interlocutory Review (Plaintiffs' Reply). Upon consideration of the authorities presented in these memoranda and the record herein, the court will deny Defendants' Motion for Reconsideration and will not certify this case for interlocutory review.

I. FACTS

On June 4, 1991, this court, by memorandum opinion, granted Plaintiff's Motion to Strike the Defendants' Nonstatutory Labor Exemption Defense. In a second memorandum opinion, filed March 10, 1992, the court granted Plaintiffs' Motion for Summary Judgment on Liability. The relevant facts are extensively presented in these two opinions.

II. RECONSIDERATION.

A. *March 10, 1992, Memorandum Opinion.*

In the March 10 opinion, the court first examined the salary restraints imposed by the NFL Defendants and

held that the restraints were subject to the antitrust laws. The court then looked to see whether the restraints were imposed in volation of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1 (1973 & Supp. 1991). After finding that the wage-fixing could not be termed a *per se* violation of the antitrust laws, the court turned to a Rule of Reason analysis. It is this analysis defendants today challenge.

The Rule of Reason requires the judge to balance the anti-competitive evils of a practice against its pro-competitive virtues. On the negative side of this balance, the court noted that the salary restraints clearly were anti-competitive in effect. On the other half of this balance, however, the court found no pro-competitive virtues. The court held that two pro-competitive purposes advanced by the defendants—enhanced competition in the labor market for professional football players and the creation of otherwise unavailable football employment opportunities—were irrelevant for lack of correlation between the restraints and the pro-competitive purposes. A third justification, the maintenance of a competitive balance among football teams, was deemed irrelevant under the D.C. Circuit's holding in *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978).

In *Smith*, a professional football player challenged the NFL's player draft as violative of § 1 of the Sherman Antitrust Act. Under the Rule of Reason analysis, the NFL asserted the draft's ultimate pro-competitive effect justified the draft system despite its anti-competitive evils. The NFL claimed that the player draft promoted a "competitive balance" among teams, thus "producing better entertainment for the public, higher salaries for the players, and increased financial security for the clubs." 593 F.2d at 1186. However, the D.C. Circuit held that the pro-competitive virtues, which were evident only on the playing field, could not be compared to the anti-competitive evils, which were apparent solely in the market for

player services. *Id.* As a result, the player draft was held to be unreasonable and a violation of the Sherman Act.

This court found that the salary restraints presently at issue were directly comparable to the player draft in *Smith.* Therefore, this court held the NFL defendants' third pro-competitive justification, the promotion of competitive balance, irrelevant under the law of this circuit. With no relevant pro-competitive virtues left to balance the clear anti-competitive evils, the court determined that the salary restraints were violative of the antitrust laws and ordered summary judgment on liability for the plaintiffs.

B. Defendants' Motion to Reconsider.

Defendants' Motion to Reconsider is grounded on defendants' reading of the Supreme Court's opinion in *NCAA v. Board of Regents of the University of Oklahoma,* 468 U.S. 85 (1984). In that case, the NCAA had imposed a restrictive television broadcasting plan for football games upon all its member universities. The University of Oklahoma challenged the restraint as a violation of antitrust laws. As in the present case, the Court did not find a *per se* violation of antitrust laws but nonetheless held the restraint unreasonable under a Rule of Reason analysis.

According to defendants' memorandum, the Supreme Court's language in *NCAA* "undermined, if not vitiated," the D.C. Circuit's opinion in *Smith.* Defendants' Motion at 2. In *NCAA,* the Court referred to the maintenance of competitive balance as a "pro-competitive justification under the Rule of Reason." 468 U.S. at 119-20.[1] The defendants assert that the NFL defendants' salary restraints

[1] The Court found this justification unavailing, however, and nonetheless held that the television regulation violated antitrust laws.

likewise help to maintain a competitive balance among the teams and is therefore a pro-competitive virtue that outweighs their anti-competitive vice.

However, *NCAA* is clearly distinguishable from both *Smith* and the present case. The "product" at issue in *NCAA* was unique—college football, a sport which weds the competition of athletics and the tradition of academics. The "character and quality" of the product—indeed, its very "integrity"—"cannot be preserved except by mutual agreement." 468 U.S. at 101-02. Without restrictions on player eligibility and academic requirements, *amateur college* football would cease to exist. Therefore, these restrictions, though clearly restraints on trade, 468 U.S. at 98, are not necessarily unreasonable since they actually "widen consumer choice—not only the choices available to sports fans but also those available to athletes." 468 U.S. at 102. Thus, they do not violate the antitrust laws.

The salary restraints here at issue, however, cannot be said to be vital to the preservation of professional football. Indeed, *professional* football as an organization would survive with or without the mandatory $1,000 a week salary restraint. As the Supreme Court emphasized in *NCAA*, the focus of the inquiry must be on reasonableness. Although some agreements among the football teams may be reasonable, it is not reasonable to allow the NFL to promulgate nonessential regulations, such as those in this case.

Since *NCAA* is not applicable to this case, the D.C. Circuit's ruling in *Smith* is still good law in this circuit. Therefore, as this court's previous opinion held, the pro-competitive virtues the NFL defendants claim are not relevant to the Rule of Reason analysis, and reconsideration of the court's March 10, 1992, opinion is DENIED.

III. CERTIFICATION.

As the NFL defendants acknowledge in their memorandum, certification for interlocutory review is only appropriate when "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Given that the trial on damages is imminent, it is evident that it would not expedite the ultimate termination of this litigation to delay the proceedings for an interlocutory appeal. Therefore, the defendants' motion to certify for interlocutory review is DENIED.

IV. CONCLUSION

For the reasons set forth herein, defendants' motion for reconsideration is DENIED. Defendants' motion, in the alternative, for certification is also DENIED.

SO ORDERED.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

Date: Sept. 2, 1992

[Filed Oct. 5, 1992]

UNITED STATES DISTRICT COURT
OF THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

JUDGMENT ON THE VERDICT
(For Plaintiffs)

This cause having been tried by the Court and a Jury, before the Honorbale Royce C. Lamberth, Judge presiding, and the issues having been duly tried and the Jury having duly rendered its special verdicts; now, therefore, pursuant to the special verdicts,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiffs have and recover of and from the defendants: PRO FOOTBALL, INC., d/b/a WASHINGTON REDSKINS; THE FIVE SMITHS, INC., d/b/a ATLANTA FALCONS; BUFFALO BILLS, INC., d/b/a BUFFALO BILLS; CHICAGO BEARS FOOTBALL CLUB, INC., d/b/a CHICAGO BEARS; CINCINNATI BENGALS, INC., d/b/a CINCINNATI BENGALS; CLEVELAND BROWNS, INC., d/b/a CLEVELAND BROWNS; DALLAS COWBOYS FOOTBALL CLUB, LTD., d/b/a DALLAS COWBOYS; PDB SPORTS, LTD., d/b/a DENVER BRONCOS; THE DETROIT LIONS, INC., d/b/a DETROIT LIONS; THE GREEN BAY PACKERS, INC., d/b/a GREEN BAY PACKERS; HOUSTON OILERS, INC., d/b/a HOUSTON OILERS; INDIANAPOLIS COLTS, INC., d/b/a INDIANAPOLIS COLTS; KANSAS CITY CHIEFS FOOTBALL CLUB, INC., d/b/a KANSAS CITY CHIEFS; THE LOS ANGELES RAIDERS, LTD., d/b/a LOS ANGELES RAIDERS; LOS ANGELES RAMS FOOTBALL COMPANY, INC., d/b/a LOS ANGELES RAMS; MIAMI DOL-

PHINS, LTD., d/b/a MIAMI DOLPHINS; MINNESOTA VIKINGS FOOTBALL CLUB, INC., d/b/a MINNESOTA VIKINGS; KMS PATRIOTS, L.P., d/b/a NEW ENGLAND PATRIOTS; THE NEW ORLEANS LOUISIANA SAINTS LIMITED PARTNERSHIP, d/b/a NEW ORLEANS SAINTS; NEW YORK FOOTBALL GIANTS, INC., d/b/a NEW YORK GIANTS; NEW YORK JETS FOOTBALL CLUB., INC., d/b/a NEW YORK JETS; THE PHILADELPHIA EAGLES FOOTBALL CLUB, INC., d/b/a PHILADELPHIA EAGLES; B & B HOLDINGS, INC., d/b/a PHOENIX CARDINALS; PITTSBURGH STEELERS SPORTS, INC., d/b/a PITTSBURGH STEELERS; THE CHARGERS FOOTBALL COMPANY, d/b/a SAN DIEGO CHARGERS; THE SAN FRANCISCO FORTY-NINERS, LTD., d/b/a SAN FRANCISCO FORTY-NINERS; THE SEATTLE PROFESSIONAL FOOTBALL CLUB, d/b/a SEATTLE SEAHAWKS; TAMPA BAY AREA NFL FOOTBALL, INC., d/b/a TAMPA BAY BUCCANEERS; and THE NATIONAL FOOTBALL LEAGUE, the following sums for each Plaintiff class member, together with costs:

1.	Aeilts, Rick	$135,000.00
2.	Alexander, Bruce	$73,500.00
3.	Andrews, Ricky	$108,000.00
4.	Ankrom, Scott	$21,187.50
5.	Antrum, Glenn	$132,750.00
6.	Ashe, Richard	$189,000.00
7.	Avery, Steve	$77,625.00
8.	Bailey, David	$177,000.00
9.	Bankston, Lon	$49,500.00
10.	Barber, Mike	$83,250.00
11.	Barnes, Reggie	$177,000.00
12.	Bauman, Charles	$12,937.50
13.	Baxter, Brad	$73,125.00
14.	Bayless, Rick	$114,750.00
15.	Beach, Sanjay	$180,000.00
16.	Becker, Chris	$84,000.00
17.	Bell, Billy	$132,000.00

18.	Bell, Grantis	$147,000.00
19.	Bell, Jim	$238,500.00
20.	Berardelli, Paul	$177,000.00
21.	Bero, Bryan	$192,000.00
22.	Birden, J.J.	$108,000.00
23.	Bishop, Jim	$30,375.00
24.	Bob, Adam	$125,812.50
25.	Bone, Warren	$12,000.00
26.	Bouyer, Willie	$110,250.00
27.	Bowick, Tony	$25,875.00
28.	Brantley, John	$42,750.00
29.	Brinkley, Lester	$219,000.00
30.	Brinson, Dana	$44,250.00
31.	Brooks, Michael	$168,000.00
32.	Brown, Eric	$27,562.50
33.	Brown, Henry	$55,687.50
34.	Brown, Tony	$426,000.00
35.	Buddenberg, John	$164,625.00
36.	Burch, John	$177,000.00
37.	Burman, Jon	$90,750.00
38.	Burnice, Karl	$132,000.00
39.	Cain, Joe	$45,937.50
40.	Carey, Richard	$99,562.50
41.	Carlson, Jeff	$264,000.00
42.	Carter, Jon	$31,500.00
43.	Chandler, Darren	$111,000.00
44.	Chapman, Ted	$20,250.00
45.	Cheattom, Ken	$63,000.00
46.	Chenault, Chris	$177,000.00
47.	Childress, Fred	$105,750.00
48.	Cole, Leon	$201,000.00
49.	Coley, James	$177,000.00
50.	Cooks, Terrence	$121,500.00
51.	Cooper, George	$198,000.00
52.	Cooper, Richard	$147,000.00
53.	Cormier, Joe	$141,750.00
54.	Couch, Gary	$128,625.00
55.	Cribbs, James	$18,375.00
56.	Crudup, Derrick	$158,625.00
57.	Cullity, Dave	$280,500.00
58.	Davis, Craig	$66,375.00

59.	Davis, Pat	$181,125.00
60.	Delaney, Jarrod	$149,156.25
61.	Derby, Glenn	$49,875.00
62.	Dial, Alan	$96,000.00
63.	Duncan, Herb	$144,000.00
64.	Edeen, David	$154,031.25
65.	Edwards, Anthony	$60,750.00
66.	Egu, Patrick	$96,000.00
67.	Ervin, Corris	$101,812.50
68.	Farr, Mel	$194,062.50
69.	Feggins, Howard	$51,750.00
70.	Finch, Lonnie	$36,575.85
71.	Flesher, Tom	$36,000.00
72.	Florence, A.	$207,000.00
73.	Floyd, Eric	$143,812.50
74.	Floyd, Victor	$101,250.00
75.	Ford, Bernard	$162,000.00
76.	Francis, Jeff	$297,000.00
77.	Franklin, Jethro	$108,000.00
78.	Fuller, Joe	$111,750.00
79.	Gabbard, Steve	$151,875.00
80.	Gainer, Derrick	$295,125.00
81.	Garrett, Jason	$147,000.00
82.	Garrett, John	$154,875.00
83.	Gicewicz, Rich	$130,312.50
84.	Gilbert, Greg	$152,625.00
85.	Glover, Deval	$276,000.00
86.	Gordon, Cedric	$137,812.50
87.	Goss, Antonio	$156,000.00
88.	Gouldsby, Mace	$98,062.50
89.	Graham, Jeff	$276,000.00
90.	Graybill, Mike	$89,437.50
91.	Green, Paul	$195,000.00
92.	Greene, A. J.	$201,000.00
93.	Griggs, David	$137,156.25
94.	Gruden, Jay	$2,892.90
95.	Hall, Mark	$63,562.50
96.	Hamilton, Darrell	$167,062.50
97.	Harris, Michael	$64,312.50
98.	Harris, Rod	$48,000.00
99.	Harry, Carl	$151,875.00

100.	Hartlieb, Chuck	$315,937.50
101.	Harvey, John	$91,875.00
102.	Harvey, Stacy	$64,687.50
103.	Haselrig, Carlton	$219,000.00
104.	Hegarty, Pat	$171,000.00
105.	Henderson, Joe	$282,000.00
106.	Hendrickson, S.	$14,343.75
107.	Henke, Brad	$259,875.00
108.	Henley, Thomas	$58,500.00
109.	Henry, Charles	$260,625.00
110.	Hess, Bill	$2,892.90
111.	Holloway, Cornell	$252,000.00
112.	Holt, Glen	$27,562.50
113.	Jackson, Tim	$121,687.50
114.	Jarvis, Ralph	$157,500.00
115.	Javis, John	$151,875.00
116.	Jaworksi, Matt	$213,000.00
117.	Jefferson, Ben	$224,812.50
118.	Jennings, Keith	$94,500.00
119.	Johnson, Kenneth	$123,000.00
120.	Johnson, Undra	$77,625.00
121.	Johnson, Wayne	$173,250.00
122.	Joines, Vernon	$200,250.00
123.	Jokisch, Paul	$146,062.50
124.	Jones, Bill	$78,468.75
125.	Jones, Eric	$101,062.50
126.	Jones, Tyrone	$146,625.00
127.	Jorden, Tim	$207,000.00
128.	Kaumeyer, Thom	$180,000.00
129.	Kirby, Scott	$91,875.00
130.	Knapton, Jeff	$48,000.00
131.	Knight, Leander	$36,000.00
132.	Langley, Andre	$60,750.00
133.	Leggett, Jerry	$130,955.40
134.	Limbrick, G.	$20,250.00
135.	Lindstrom, Eric	$67,031.25
136.	Lloyd, Doug	$267,000.00
137.	Lossow, Rodney	$234,000.00
138.	Lyons, Robert	$77,437.50
139.	Marlatt, Pat	$111,375.00
140.	Marshall, D.	$276,000.00

141.	Martin, Tony	$151,875.00
142.	Mayes, Michael	$94,500.00
143.	McGruder, M.	$387,562.50
144.	McNair, Todd	$22,500.00
145.	McNeil, Emanuel	$194,062.50
146.	Mehre, Harry	$131,625.00
147.	Messner, Mark	$108,000.00
148.	Mickel, Jeff	$198,000.00
149.	Miller, John	$64,312.50
150.	Miotke, Frank	$276,000.00
151.	Mitchel, Eric	$13,875.00
152.	Mitchell, Alvin	$87,750.00
153.	Molander, Scooter	$72,000.00
154.	Moore, Tim	$18,375.00
155.	Moyer, Ken	$55,312.50
156.	Murray, Dan	$126,000.00
157.	Nedved, Jeff	$74,625.00
158.	Nicholson, C.	$133,875.00
159.	Nittmo, Bjorn	$148,125.00
160.	Norgard, Erik	$187,968.75
161.	Norris, Darren	$129,375.00
162.	Oliver, Jeff	$121,687.50
163.	Oliver, Maurice	$131,625.00
164.	Oliver, Robert	$41,250.00
165.	Orlando, Bo	$195,000.00
166.	Owens, Kerry	$306,000.00
167.	Patchan, Matt	$42,750.00
168.	Paterra, Greg	$77,625.00
169.	Pettyjohn, Barry	$177,000.00
170.	Philcox, Todd	$177,000.00
171.	Popp, Dave	$231,000.00
172.	Pritchett, Wes	$276,000.00
173.	Roach, Kirk	$15,750.00
174.	Robbins, Kevin	$414,000.00
175.	Robinson, Lybrant	$121,687.50
176.	Rogers, Tracy	$195,000.00
177.	Roland, Benji	$207,000.00
178.	Ross, Greg	$9,187.50
179.	Roth, Jeff	$34,125.00
180.	Sadowski, Troy	$38,812.50
181.	Samuel, Peda	$16,500.00

182.	Sancho, Ron	$186,000.00
183.	Sargent, Anthony	$157,500.00
184.	Searels, Stacy	$252,000.00
185.	Shelton, Richard	$96,000.00
186.	Shiver, Stan	$147,000.00
187.	Shorts, Peter	$165,937.50
188.	Siglar, Ricky	$388,875.00
189.	Simien, Kevin	$207,000.00
190.	Simien, Tracy	$184,500.00
191.	Simmons, Michael	$137,812.50
192.	Simpson, John	$36,750.00
193.	Singer, Paul	$180,562.50
194.	Smiley, Tim	$246,187.50
195.	Smith, Elliot	$168,000.00
196.	Smith, Vernice	$70,875.00
197.	Snead, Willie	$12,000.00
198.	Snyder, Brent	$177,000.00
199.	Spears, Anthony	$184,500.00
200.	Stephens, Richard	$55,312.50
201.	Stephens, Rod	$36,750.00
202.	Stephenson, Jeff	$78,375.00
203.	Sterling, Rod	$60,750.00
204.	Stewart, Curtis	$121,500.00
205.	Stock, Mark	$103,500.00
206.	Streeter, George	$84,750.00
207.	Strom, Rick	$55,312.50
208.	Stryzinski, Dan	$12,000.00
209.	Talley, John	$163,312.50
210.	Tanner, Randy	$11,062.50
211.	Tardits, Richard	$213,000.00
212.	Taylor, Brian	$88,500.00
213.	Taylor, Craig	$22,125.00
214.	Thompson, Bennie	$194,250.00
215.	Tippins, Ken	$55,312.50
216.	Turner, Marcus	$47,250.00
217.	Usher, Darryl	$23,250.00
218.	Van Druten, R.	$155,250.00
219.	Waddle, Tom	$116,531.25
220.	Walton, Tim	$119,437.50
221.	Ware, Reggie	$15,750.00
222.	Weidner, Robert	$147,000.00

223.	Wells, Dana	$31,950.00
224.	Werner, Greg	$60,000.00
225.	Weston, Rhondy	$40,875.00
226.	Wheeler, Todd	$45,937.50
227.	Whitaker, Danta	$201,000.00
228.	White, Todd	$45,937.50
229.	Wilkerson, Eric	$123,750.00
230.	Wilkerson, Gary	$210,000.00
231.	Williams, Mike	$91,875.00
232.	Williams, Ronnie	$15,750.00
233.	Williams, Wayne	$165,937.50
234.	Woods, Jerry	$131,625.00
235.	Zackery, Tony	$194,062.50

NANCY MAYER-WHITTINGTON
Clerk

Dated: October 5, 1992

By: /s/ Francis L. Gilbert

[Filed May 12, 1993]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

PERMANENT INJUNCTION

Upon consideration of Plaintiffs' Motion for Permanent Injunction and the Court being fully apprised, it is hereby

ORDERED, ADJUDGED AND DECREED that Defendants PRO FOOTBALL, INC., d/b/a WASHINGTON REDSKINS; THE FIVE SMITHS, INC., d/b/a ATLANTA FALCONS; BUFFALO BILLS, INC., d/b/a BUFFALO BILLS; CHICAGO BEARS FOOTBALL CLUB, INC., d/b/a CHICAGO BEARS; CINCINNATI BENGALS, INC., d/b/a CINCINNATI BENGALS; CLEVELAND BROWNS, INC., d/b/a CLEVELAND BROWNS; DALLAS COWBOYS FOOTBALL CLUB, LTD., d/b/a DALLAS COWBOYS; PDB SPORTS, LTD., d/b/a DENVER BRONCOS; THE DETROIT LIONS, INC., d/b/a DETROIT LIONS; THE GREEN BAY PACKERS, INC., d/b/a GREEN BAY PACKERS; HOUSTON OILERS, INC., d/b/a HOUSTON OILERS; INDIANAPOLIS COLTS, INC., d/b/a INDIANAPOLIS COLTS; KANSAS CITY CHIEFS FOOTBALL CLUB, INC., d/b/a KANSAS CITY CHIEFS; THE LOS ANGELES RAIDERS, LTD., d/b/a LOS ANGELES RAIDERS; LOS ANGELES RAMS FOOTBALL COMPANY, INC., d/b/a LOS ANGELES RAMS; MIAMI DOLPHINS, LTD., d/b/a MIAMI DOLPHINS; MINNESOTA VIKINGS FOOTBALL CLUB, INC., d/b/a MINNESOTA VIKINGS; KMS PATRIOTS, L.P., d/b/a NEW ENGLAND PATRIOTS; THE NEW ORLEANS LOUISIANA SAINTS LIMITED PARTNERSHIP, d/b/a

NEW ORLEANS SAINTS; NEW YORK FOOTBALL GIANTS, INC., d/b/a NEW YORK GIANTS; NEW YORK JETS FOOTBALL CLUB, INC., d/b/a NEW YORK JETS; THE PHILADELPHIA EAGLES FOOTBALL CLUB, INC., d/b/a PHILADELPHIA EAGLES; B & B HOLDINGS, INC., d/b/a PHOENIX CARDINALS; PITTSBURGH STEELERS SPORTS, INC., d/b/a PITTSBURGH STEELERS; THE CHARGERS FOOTBALL COMPANY, d/b/a SAN DIEGO CHARGERS; THE SAN FRANCISCO FORTY-NINERS, LTD., d/b/a SAN FRANCISCO FORTY-NINERS; THE SEATTLE PROFESSIONAL FOOTBALL CLUB, d/b/a SEATTLE SEAHAWKS; TAMPA BAY AREA NFL FOOTBALL, INC., d/b/a TAMPA BAY BUCCANEERS; and NATIONAL FOOTBALL LEAGUE are permanently enjoined, and shall refrain, from agreeing among themselves, from conspiring, and/or from performing any act in furtherance of any agreement or conspiracy, to establish, whether overtly or otherwise, a uniform regular-season salary for any category of players whom Defendants may at any time employ.

/s/ Royce C. Lamberth
United States District Judge

Dated: May 12, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Notice is hereby given that all defendants in this action (identified in the caption above) hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the final judgment issued in this action on May 12, 1993. This appeal encompasses all prior non-final orders and all rulings which produced and supported the judgment, including, but not limited to: the Order entered on July 3, 1990 (certifying the plaintiff class); the Order entered on July 6, 1990 (amending the class certification); the Order entered on June 4, 1991 (summary judgment on labor exemption); the Order entered on March 10, 1992 (summary judgment on liability); the Order entered on September 2, 1992 (reconsideration or certification of liability ruling); the Order entered on September 11, 1992 (decertification of the class); the Order entered September 28, 1992 (motions *in limine*); the Judgment on the Verdict entered on October 5, 1992; the Order entered May 12, 1993 (defendants' motion for judgment as a matter of law or for a new trial, plaintiffs' motion for a permanent injunction); and the Order entered on August 27, 1993 (defendants' motion to vacate permanent injunction).

Respectfully submitted,

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Dated: September 10, 1993

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Consolidated Case Nos. 93-7102, 93-7165

ANTONY BROWN, *et al.*,
Plaintiffs-Appellees,
v.

PRO FOOTBALL, INC., d/b/a
WASHINGTON REDSKINS, *et al.*,
Defendants-Appellants.

APPELLANTS' STATEMENT OF ISSUES

1. Whether the District Court erred as a matter of law when it certified, and then refused to decertify, a plaintiff class of 235 Developmental Squad players, despite the predominance of individualized issues relating to each player's claim of injury and damages, and despite the jury confusion and prejudice to defendants caused thereby.

2. Whether the District Court erred as a matter of law when it determined that the antitrust laws are applicable to the employment terms at issue in this case, despite the fact that section 6 of the Clayton Act makes such laws inapplicable to alleged restraints—such as those at issue here—that affect only the labor market.

3. Whether the District Court erred as a matter of law when it ruled, on summary judgment, that plaintiffs' antitrust claims were not barred by the nonstatutory labor exemption to the antitrust laws, despite the fact that the challenged terms of employment were both conceived and implemented during an ongoing collective bargaining relationship between the parties.

4. Whether the District Court erred as a matter of law when it ruled, on summary judgment, that the uniform salaries paid to 1989 NFL Developmental Squad players violated the antitrust laws under the Rule of Reason, despite the fact that the case upon which the District Court principally relied for this result—*Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978)—was conclusively undermined by the Supreme Court's subsequent decision in *NCAA* v. *Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), and despite the fact that, as the District Court recognized, there was evidence of pro-competitive benefits created by the challenged restraint.

5. Whether the District Court erred as a matter of law when it denied defendants' motion for judgment following the jury verdict, despite the lack of any legally sufficient evidentiary basis for the jury's excessive damages award.

6. Whether the District Court erred as a matter of law when it admitted, over defendants' objection, evidence relating to the purpose and effect of the challenged employment terms, despite the fact that these issues had already been decided adversely to the defendants by the court's summary judgment ruling on antitrust violation and were thus irrelevant and unduly prejudicial to defendants on the issue of damages.

7. Whether, if the Court finds reversible error only with respect to violation issues, the Court should remand for a full retrial on violation, injury, and damages because the issue of violation is not so distinct and separable from the issues of injury and damages that a retrial limited only to issues of violation could be had without injustice.

8. Whether the District Court erred as a matter of law when it granted plaintiffs' request for a permanent injunction barring defendants from establishing "a uniform regular season salary for any category of players

whom [they] may at any time employ," and then declined to vacate the injunction, despite the lack of any imminent threat sufficient to justify such an injunction and the fact that the injunction interferes with the parties' labor law rights.

Respectfully submitted,

/s/ Richard W. Buchanan
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October 20, 1993

Supreme Court
FILED
JAN 19 1996
CLERK

No. 95-388

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,
Petitioners,
v.
PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR PETITIONERS

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January 19, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

60 pp

QUESTION PRESENTED

Whether the nonstatutory labor exemption to the antitrust laws immunizes from antitrust scrutiny all concerted restraints on competition for the services of unionized employees that are unilaterally imposed by a multiemployer cartel, so that employees must forgo collective bargaining in order to challenge such restraints under the antitrust laws.

PARTIES TO THE PROCEEDING

Petitioners are a class of 235 professional football players who played on developmental practice squads of the 28 member clubs of the National Football League during the 1989 season. The named petitioners are Antony Brown, James Bishop, John Buddenberg, Gary Couch, Craig Davis, Ricky Andrews, Thom Kaumeyer, Wesley Pritchett and John Simpson, each of whom was a named plaintiff in Civil Action No. 90-1071, a class action brought in the United States District Court for the District of Columbia. Petitioners were appellees in consolidated case Nos. 93-7165 and 94-7071 in the United States Court of Appeals for the District of Columbia Circuit.

Respondents are the National Football League ("NFL" or "League"), an unincorporated association of professional football clubs, and the 28 separate business entities that operated clubs in association with the NFL during the 1989 season (or their successors): Pro-Football, Inc., d/b/a Washington Redskins; The Five Smiths, Inc., d/b/a Atlanta Falcons; Buffalo Bills, Inc., d/b/a Buffalo Bills; Chicago Bears Football Club, Inc., d/b/a Chicago Bears; Cincinnati Bengals, Inc., d/b/a Cincinnati Bengals; Cleveland Browns, Inc., d/b/a Cleveland Browns; Dallas Cowboys Football Club, Ltd., d/b/a Dallas Cowboys; PDB Sports, Ltd., d/b/a Denver Broncos; The Detroit Lions, Inc., d/b/a Detroit Lions; Green Bay Packers, Inc., d/b/a Green Bay Packers; Houston Oilers, Inc., d/b/a Houston Oilers; Indianapolis Colts, Inc., d/b/a Indianapolis Colts; Kansas City Chiefs Football Club, Inc., d/b/a Kansas City Chiefs; Los Angeles Raiders, Ltd., d/b/a Oakland Raiders; Los Angeles Rams Football Company, Inc., d/b/a St. Louis Rams; Miami Dolphins, Ltd., d/b/a Miami Dolphins; Minnesota Vikings Football Club, Inc., d/b/a Minnesota Vikings; KMS Patriots, L.P., d/b/a New England Patriots; The New Orleans Louisiana Saints Limited Partnership, d/b/a New Orleans Saints; New York Football Giants, Inc., d/b/a

New York Giants; New York Jets Football Club, Inc., d/b/a New York Jets; The Philadelphia Eagles Football Club, Inc., d/b/a Philadelphia Eagles; B & B Holdings, Inc., d/b/a Phoenix Cardinals; Pittsburgh Steelers Sports, Inc., d/b/a Pittsburgh Steelers; The Chargers Football Company, d/b/a San Diego Chargers; The San Francisco Forty-Niners, Ltd., d/b/a San Francisco Forty-Niners; The Seattle Professional Football Club, d/b/a Seattle Seahawks; and Tampa Bay Area NFL Football, Inc., d/b/a Tampa Bay Buccaneers. Respondents were defendants in the District Court and appellants in the Court of Appeals.

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Powell v. NFL, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991) 23, 42, 48

Radovich v. NFL, 352 U.S. 445 (1957) ..... 5, *passim*

Richards v. Neilsen Freight Lines, 810 F.2d 898 (9th Cir. 1987) 20

Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975) 26

Rum Creek Coal Sales, Inc. v. Caperton, 971 F.2d 1148 (4th Cir. 1992) 29

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Silver v. New York Stock Exchange, 373 U.S. 341 (1963) 17, 46

Smith v. Pro Football, Inc., 420 F. Supp. 738 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978) 23

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Wood v. National Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987) 33
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29 U.S.C. § 157 ..... 4, *passim*
29 U.S.C. § 158 ..... 18, 32, 47
28 U.S.C. § 1254(1) 3

Other Authorities

75 Cong. Rec. (1932) 38, 39
2 Phillip Areeda & Donald F. Turner, *Antitrust Law* (1978) 24-25
Richard A. Posner & Frank H. Easterbrook, *Antitrust* (1981) 26
Roger D. Blair & Jeffrey L. Harrison, *Monopsony* (1993) 26
Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 Duke L.J. 339 23

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Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 Geo. L.J. 19 (1986) 23

James M. Altman, *Antitrust: A New Tool for Organized Labor?*, 131 U. Penn. L. Rev. 127 (1982) .. 39

Lee Goldman, *The Labor Exemption to the Antitrust Laws as Applied to Employers' Labor Market Restraints in Sports and Non-Sports Markets*, 1989 Utah L. Rev. 617 23

Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 Yale L.J. 1 (1971) 33, 34, 37

Note, *Releasing Superstars From Peonage: Union Consent and the Nonstatutory Labor Exemption*, 104 Harv. L. Rev. 874 (1991) 23, 45, 47

Joe Gordon, "NHLPA Eyes Suit; Owners May Hear Antitrust Charge," Boston Herald, Dec. 25, 1944 .. 44

John Helyar, "Power Plays: Pro Basketball Loses Its 'Feel Good' Image in Nasty Labor Dispute," Wall St. J., Aug. 7, 1995 43

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-388

ANTONY BROWN, *et al.*,
Petitioners,

v.

PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS

INTRODUCTORY STATEMENT

This case presents a much-anticipated opportunity for the Court to clarify the limitations of the so-called "non-statutory labor exemption" to the antitrust laws—a judicially created antitrust immunity that is justified only as necessary to avoid conflicts between the Sherman Act's goal of free competition in all markets, including labor markets, and the national labor relations policy favoring collective bargaining agreements over wages and other terms and conditions of employment.

Consistent with this Court's precedents, lower courts have generally confined the reach of the exemption to

employment terms that are mutually agreed to by employers and employees through good faith collective bargaining. In its opinion below, however, the Court of Appeals vastly expanded this judge-made exemption to immunize from antitrust scrutiny a concerted salary-fixing arrangement that the member clubs of the National Football League unilaterally imposed on a narrow group of practice players after declaring an impasse in labor negotiations. Although the football players' bargaining representative had never agreed to the League's salary fix, a majority of the Court of Appeals held that all such multi-employer restraints on labor competition are exempt from antitrust review with or without employee consent simply by virtue of the employees' decision to engage in collective bargaining.

The dramatically expansive antitrust immunity adopted below violates the basic limitations on a court's power to read implied exemptions into the federal antitrust laws and, unless overturned, will inevitably be destructive of the very labor policies invoked to justify it. This Court should reverse the judgment of the Court of Appeals and return the nonstatutory labor exemption to its original and proper mooring: employee consent embodied in a written agreement.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 50 F.3d 1041 (1995) and is reprinted in the appendix to the petition for certiorari ("Pet. App.") at pages 1a-60a. The Court of Appeals' orders denying rehearing and rehearing *in banc* are reprinted at Pet. App. 61a-63a. The opinion of the Court of Appeals reversed a memorandum opinion and order of the United States District Court for the District of Columbia granting petitioners' motion to strike respondents' nonstatutory labor exemption defense and denying respondents' cross-motion for summary judgment as to the nonstatutory labor exemption. The Dis-

trict Court's memorandum opinion and order on the nonstatutory labor exemption are reported at 782 F. Supp. 125 (1991) and reprinted at Pet. App. 64a-92a. The District Court's memorandum opinion and order granting petitioners' motion for summary judgment on antitrust liability are reported at 1992-1 Trade Cas. (CCH) ¶ 69,747 and reprinted at Pet. App. 93a-115a. The District Court's opinion denying respondents' motion for reconsideration on the issue of liability is reprinted in the joint appendix ("J.A.") at pages 120-24. The District Court's award of damages to petitioners following a jury trial is reported at 1993 Trade Cas. (CCH) ¶ 70,260 and reprinted at J.A. 125-32, and its order permanently enjoining respondents from collectively fixing player salaries is reported at 821 F. Supp. 20 (1993) and reprinted at J.A. 133-34.

JURISDICTION

The Court of Appeals issued its opinion on March 21, 1995. Pet. App. 1a. Petitioners filed a timely petition for rehearing, which the Court of Appeals denied on June 12, 1995. *Id.* at 61a. Petitioners filed their petition for certiorari on September 11, 1995. This Court granted certiorari on December 8, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without

> respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 1 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, states:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Section 7 of the NLRA, 29 U.S.C. § 157, provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

STATEMENT OF THE CASE

Petitioners are a class of 235 professional football players who served on practice squads for NFL clubs during the 1989 football season. Petitioners brought this antitrust action alleging that respondents—the NFL and its 28 member clubs—violated § 1 of the Sherman Act by combining to adopt and enforce a uniform fixed salary for practice squad players that eliminated any opportunity for competitive bidding among the NFL clubs for petitioners' services.

This case is representative of numerous antitrust actions challenging restraints on competition for players' services in the NFL and other professional sports leagues that have arisen since this Court decided in *Radovich v. NFL*, 352 U.S. 445 (1957), that the antitrust laws have full application to restraints on players' services in football and every other sport (except, for peculiar historical reasons, baseball). *See Flood v. Kuhn*, 407 U.S. 258, 284 (1972) (reaffirming *Radovich*). In the world of professional team sports, as in similarly structured industries like entertainment, there is a critical interplay between employees' individual antitrust rights and the collective bargaining regime of the National Labor Relations Act. Employees in these industries have organized into collective bargaining associations precisely to *preserve* an area of effective competition among employers for the services of highly talented individuals. The present case goes to the heart of this fundamental interplay between the federal labor laws and the antitrust laws.

The critical facts are these: In 1989, the NFL clubs decided amongst themselves to establish "developmental squads" of practice/replacement players and, purely to save money, decided to eliminate salary competition by requiring each NFL club to pay every developmental squad player a uniform fixed salary of $1,000 per week, or a total of $16,000 per season. In prior seasons, the salaries for comparable players had been set through individual negotiations and in the 1988 season had averaged just under $4,000 per week. Respondents attempted to persuade the players' association to agree to the scheme in collective bargaining. Although the players' association was in favor of the developmental squad concept, *it rejected the clubs' insistence upon a fixed salary for all such players, something that had never before been part of professional football.* Respondents then declared an impasse in negotiations and unilaterally implemented the $1,000 per week salary for petitioners, thereby saving themselves more than $10 million in payroll costs for the 1989 season.

The District Court (Lamberth, J.) rejected respondents' defense that their unilateral imposition of a concerted salary restraint was shielded from antitrust review by the nonstatutory labor exemption. On the merits, the District Court ruled that respondents' fixed salary was an unreasonable restraint on competition in violation of § 1, and a jury found that petitioners had been financially harmed and were entitled to more than $10 million in aggregated compensatory damages. Without reaching the merits, a divided panel of the Court of Appeals reversed. The majority concluded that the NLRA broadly precludes any antitrust inquiry into the reasonableness of a restraint on labor services that is unilaterally imposed by employers in the context of a collective bargaining relationship.

A. Statement of Facts

The National Football League is the sole major professional football league in the United States. J.A. 50. The clubs that comprise the League jointly produce and market professional football games, but they remain separate and distinct business entities that compete with one another to acquire the services of football players. *Id.* at 58, 74.[1] By acting in concert to depress the prices they pay for players' services, the NFL clubs can collectively exercise monopsony power in the market for top-level football talent, since the players have no comparable alternative buyers for their uniquely valuable athletic skills. Pet. App. 39a-41a (Wald, J., dissenting).

Thus, unlike those employees who have traditionally organized into unions for the purpose of eliminating labor

[1] There were 28 member clubs associated with the NFL during the 1989 season. Two of the respondent clubs have since moved to different cities—the Los Angeles Rams are now the St. Louis Rams, and the Los Angeles Raiders are once again the Oakland Raiders. In addition, two new clubs have joined the League, the Carolina Panthers and the Jacksonville Jaguars, neither of which is a respondent in this case.

market competition, professional football players formed their bargaining organization, the NFL Players Association, largely to *promote inter-club competition* by removing and resisting devices (such as reserve clauses) that NFL owners have historically adopted to suppress free agency and competitive bidding for players' services. *Id.* at 36a n.2. The Players Association is the exclusive bargaining representative under the NLRA for all NFL players, including petitioners. J.A. 58-59. As long as the players have been represented by the Players Association (and before), every player's salary has been determined through individual negotiation with the clubs, subject only to certain minimum salary levels specified, when applicable, in a collective-bargaining agreement. At no time in the course of bargaining with respondents has the Players Association ever consented to a fixed regular season salary for any category of NFL player.

In 1982, the Players Association entered into a collective bargaining agreement with the clubs' bargaining representative, the NFL Management Council. Consistent with the position long maintained by the Players Association, the 1982 agreement guaranteed all players the right to negotiate their own individual salaries. The 1982 agreement expired at the end of August 1987. Pet. App. 70a.[2]

In February 1989, two committees of NFL club owners —the Finance Committee and the Long Range Planning Committee—met jointly and formulated a plan known as "1989 Resolution G-2," which created the concept of developmental squads. Pet. App. 65a. The players on developmental squads would serve as practice players in scrimmages with the clubs' active roster players and would be available to suit up and play in NFL games, but only as replacements for active players. Under Resolution G-2, each club would be allowed to sign no more

[2] No succeeding collective bargaining agreement for NFL players was reached until 1993.

than six rookie or first-year free agents to developmental squad contracts and would be required to pay each developmental squad player a uniform fixed weekly salary. *Ibid.*[3] At their annual meeting on March 22, 1989, the NFL owners in Executive Session voted to adopt Resolution G-2 and to amend the NFL Constitution and Bylaws to establish developmental squads.

The primary purpose of the fixed-salary concept was "to save [the clubs] money," as respondents "frankly admitted." *Id.* at 57a-58a (Wald, J., dissenting). *See id.* at 98a; J.A. 61-62. In prior seasons, developmental squad functions were performed by "injured reserve" players who had negotiated individual contracts with the NFL clubs.[4] Twenty members of the petitioner class, for example, had practiced with their teams as injured reserve players in 1988 and had received individually negotiated salaries that averaged just over $3,750 per week. J.A. 86; Pet. App. 95a-99a. Requiring all clubs to pay a uniform fixed salary for developmental squad contracts would prevent these players from individually negotiating competing salary offers from the clubs.[5]

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[3] Rookies were defined as players who had not previously been under contract to a professional football team. First-year players were those who had been active in another professional football league or whose NFL experience was limited to training camp or fewer than three games on an active roster. Pet. App. 94a n.3. Resolution G-2 also required the clubs to negotiate a standard player contract with each developmental squad player to establish salary and other terms that would become effective if the player later made the active roster. J.A. 13, 42.

[4] Under the NFL's Constitution, "injured reserve" players were those who, because of an injury, were placed on a reserve roster and were not permitted to play in games, though they could practice with their teams as soon as they were physically able. *See* Pet. App. 96a-97a. In 1988, such players could be moved to the active roster and play in games, just as the developmental squad players could in 1989.

[5] The terms of the resolution permitted clubs to sign players to developmental squad contracts on September 5, 1989, the day after

On April 7, 1989, the Executive Director of the Management Council, Jack Donlan, sent a letter with a copy of Resolution G-2 to Gene Upshaw, the Executive Director of the Players Association. J.A. 11-15. Donlan informed Upshaw of the NFL's adoption of Resolution G-2 and suggested a meeting "to negotiate . . . the terms and conditions applicable to developmental squad players." *Id.* at 11; Pet. App. 65a-66a. *See id.* at 69a.

On May 17, 1989, several owners who were members of the League's Management Council met and agreed among themselves that all developmental squad players would be paid a fixed salary of $1,000 per week for the regular season and any post-season weeks. *Id.* at 66a. This arrangement guaranteed that practice players would be limited to a total compensation of $16,000 for the 1989 regular season. Resolution G-2 had the purpose and effect of replacing the higher individually negotiated salaries received by injured reserve practice players in 1988 with a flat $1,000 fixed salary for 1989. *See* J.A. 84-89, 94-95; Pet. App. 95a-99a. As it would turn out, the number of developmental squad players in 1989 corresponded one-for-one with a reduction in the number of injured reserve players, *see* J.A. 94-95, and Resolution G-2 succeeded in saving the clubs a total of more than $10 million at the expense of these practice players.[6]

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the clubs were required to reduce their rosters to 47 regular players. *See* J.A. 41, 60. A player was eligible for a developmental squad if he failed to make the cut for the regular roster and was not claimed by another team in the pre-season "waivers" process—*i.e.*, no other club had signed him to a contract for its regular roster. *See* Pet. App. 7a-8a; J.A. 67. At that point, the player became a "free agent" and, *if the League had not mandated a fixed salary*, would have been able to solicit competing bids from different clubs for his services as a developmental squad player.

[6] Contrary to respondents' assertion that the $1,000 figure was "slightly less than the collectively bargained minimum salary for regular roster players," Opp. to Pet. for Cert. 3, the minimum

On May 18, the day after the owners settled on the $1,000 figure, Donlan of the Management Council sent the Players Association a second letter requesting negotiations over the terms and conditions for developmental squad players and proposing the following modification to the 1982 collective bargaining agreement with respect to such players:

> "Article XXII, *Salaries*, shall not apply. In lieu thereof, establish special services contract providing for salaries of $1,000 per week, prorated on a daily basis.
>
> ". . . Article XXVIII, *Post-Season Pay*, shall not apply." J.A. 17, 63; Pet. App. 66a.

Upshaw of the Players Association wrote back on May 30 stating that the Players Association was willing to agree to the developmental squad concept, but only if developmental squad players received the same benefits and protections afforded other players, "includ[ing] the right to negotiate their own salaries." J.A. 18, 63; Pet. App. 66a. On June 16, after a meeting with the Players Association, Donlan wrote an internal memorandum to members of the Management Council informing them that the Players Association "could not agree to any arrangement that eliminated the right of any player to negotiate his individual salary." Donlan concluded that "[f]or implementation purposes, the issue is clearly at impasse." J.A. 19-20, 64; Pet. App. 66a. The Players Association sent the Management Council a follow-up letter on July 6 reiterating the position "that all players, including developmental, should have the right to negotiate salary terms, and that no fixed wage for any group of players is acceptable to the NFLPA." J.A. 23, 65; Pet. App. 67a.

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salary for rookie players on the regular roster in 1986—the last season covered by the 1982 agreement—was $50,000 per season, or $3,125 per week. *See* Court of Appeals Joint Appendix ("Ct. App. J.A.") 133.

The League then unilaterally implemented Resolution G-2 by distributing a uniform developmental squad player contract that all clubs were required to use. Pet. App. 7a. The Management Council advised the clubs on August 22, 1989, that "[w]eekly compensation to be paid to Developmental Squad Players is $1,000" and "[i]ndividually negotiated terms above or below $1,000 are not permitted." J.A. 66. On August 24, NFL Commissioner Pete Rozelle sent a memorandum to all clubs threatening disciplinary action for any violation of the fixed salary scheme:

> "All signings must be on the Developmental Squad contract, which was previously provided to you. All players on the Developmental Squad will be paid a salary of $1,000 per week. Any other direct or indirect compensation provided to Developmental Squad players is impermissible, and clubs violating this provision will be subject to appropriate discipline, including the loss of draft choices." *Ibid.*; Pet. App. 7a.

On September 4, 1989, the day before the clubs began signing developmental squad players, Commissioner Rozelle distributed another memorandum reminding the clubs that "[i]ndividually negotiated terms above or below $1,000 are not permitted" for developmental squad players. J.A. 67-68; Pet. App. 67a. "This means," he added, "that Developmental Squad players may not receive any other compensation or benefit from the club, directly or indirectly, in any form. Housing arrangements, per diem, and any other form of compensation or benefit are impermissible." J.A. 68; Pet. App. 67a.

B. Proceedings Below

The named petitioners filed this action on May 9, 1990, on behalf of themselves and all players who had signed developmental squad contracts for the 1989 season. Petitioners sought damages and injunctive relief on the claim

that respondents' concerted imposition of the $1,000 per week fixed salary constituted an unreasonable restraint of trade in violation of the Sherman Act. J.A. 29-40.[7] Respondents invoked the nonstatutory labor exemption as a defense, *id.* at 50, and the parties filed cross-motions for summary judgment on the applicability of the exemption. *Id.* at 55-57, 70-71.

The District Court ruled that respondents' restraint was not entitled to antitrust immunity. Pet. App. 64a-92a. The court concluded, first, that any immunity available to respondents had expired with the parties' 1982 bargaining agreement, *id.* at 72a-80a; second, that in the alternative the exemption could not extend beyond the point when the parties had reached impasse in negotiations over a successor agreement, *id.* at 80a-86a; and, finally, that the exemption was inapplicable because the Players Association had never agreed to the fixed salary, *id.* at 86a-90a.

In a subsequent ruling, the District Court granted petitioners' motion for summary judgment on antitrust liability. *Id.* at 93a-115a. The court found that respondents' salary-fixing restraint "necessarily eliminated all competition and prevented prospective Developmental Squad players from negotiating salary terms among interested NFL clubs." *Id.* at 111a. The restraint "robbed each seller of football services of any bargaining power, left no room for competition among the teams for the services of rookie and first year players, and utterly stripped them of any measure of control over the marketing of their talents." *Ibid.* (internal quotation marks and brackets omitted). The court found no procompetitive purposes that could justify the restraint. *Id.* at 111a-114a.[8]

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[7] Shortly after petitioners filed suit, respondents discontinued the fixed-salary developmental squads.

[8] Respondents produced no contemporaneous documents to support their claim that Resolution G-2 was adopted to promote greater on-field competition—a claim first articulated in opposition to sum-

A jury trial was held on damages. Based on evidence that the 235 petitioners would have earned an average of $5,189 per week as developmental squad players during the 1989 season if not for respondents' concerted elimination of competition, the jury found aggregated damages for the petitioner class in the amount of $10,116,547. The District Court trebled the award pursuant to § 4 of the Clayton Act and entered judgment against respondents for $30,349,642. J.A. 125-32. The District Court also permanently enjoined respondents from conspiring to fix regular season salaries for NFL players. *Id.* at 133-34.

A divided panel of the Court of Appeals reversed solely on the basis of the nonstatutory labor exemption. Pet. App. 1a-60a. The majority, in an opinion by Chief Judge Edwards, held that the exemption "shields from antitrust challenge alleged restraints on competition imposed through the collective bargaining process, so long as the challenged actions are lawful under the labor laws and primarily affect only a labor market organized around a collective bargaining relationship." *Id.* at 10a. Although acknowledging that the Sherman Act would ordinarily apply to restraints imposed by a combination of employers on the labor market, the majority reasoned that "the inception of a collective bargaining relationship between employees and employers irrevocably alters the governing legal regime," *id.* at 24a, and from that point onward the Sherman Act "necessarily is replaced by the NLRA paradigm of organized negotiation." *Id.* at 25a. In short, according to the majority:

> "[T]he nonstatutory labor exemption requires employees involved in a labor dispute to choose whether

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mary judgment. *See* J.A. 90. The League's Competition Committee, which was responsible for "competitive aspects of the game," had no involvement in the formulation of Resolution G-2, and only one of its five members preferred the establishment of developmental squads over the existing system. *See* Ct. App. J.A. 698-99, 704-06, 990-91, 2505-06.

to invoke the protections of the NLRA or the Sherman Act. If employees wish to seek the protections of the Sherman Act, they may forego unionization or even decertify their unions." *Id.* at 30a.

In dissent, Judge Wald characterized the majority's rule as "contrary to the purposes of *both* the labor laws and the antitrust laws" because it "ousts antitrust law only to encourage fewer collective bargaining agreements." *Id.* at 49a (emphasis in original). Judge Wald concluded that a blanket antitrust exemption for multi-employer restraints would create perverse incentives for the parties to labor disputes: Employers would have "new incentives to harden their bargaining positions" and force negotiations to impasse so as to impose their preferred restraints without fear of antitrust scrutiny. *Id.* at 46a-47a. At the same time, the total ouster of antitrust rights would discourage employees from entering into collective bargaining relationships and would lead to union decertifications, results that "run directly contrary to the overarching purpose of the labor laws to encourage bona fide collective bargaining." *Id.* at 47a-48a.

SUMMARY OF ARGUMENT

The decision of the majority below represents a bold and unrestrained expansion of what was once a carefully limited judge-made exemption from the antitrust laws. In broadening the nonstatutory labor exemption to immunize all labor market restraints imposed by employers in industries where there is collective bargaining, the Court of Appeals seriously breached the cardinal principles of statutory construction that strictly confine the power of courts to declare implied repeals of the Sherman Act.

There is no clear repugnancy between the Sherman Act and the National Labor Relations Act that necessitates a blanket repeal of antitrust law for unionized labor markets. As developed and applied by this Court and the majority of lower courts, the nonstatutory labor exemption properly protects restraints on the terms of em-

ployment only when those restraints are the product of mutual consent in collective bargaining agreements between employers and employees. A narrow labor exemption limited to such consensual restraints respects the well-established interest of the Sherman Act in scrutinizing the reasonableness of concerted conduct by employers that eliminates competition over terms of employment. So narrowed, the exemption also effectuates the NLRA because it does not impede or penalize the exercise of employees' § 7 rights and, at the same time, preserves the legal "backdrop" for collective bargaining that Congress intended to maintain.

The reasons advanced by the Court of Appeals fail to justify ousting the Sherman Act from the collective bargaining relationship. The panel majority's desire to adjust the relative bargaining power of employees and employers under the NLRA reveals a policy judgment that cannot legitimately support its decision. The court's belief that employees who organize for collective bargaining forfeit their rights to negotiate individual employment terms in a competitive market cannot be squared with the collective bargaining experience in professional sports where players' associations have consistently preserved a role for such competition.

Nor was the court correct in assuming that employers have a "right" to impose their own terms upon impasse that is protected by the NLRA. That "right" is derived from the common law and is subject to generally applicable background laws, including the antitrust laws; moreover, this Court's recent implied labor preemption decisions fully support the distinction between an employer's use of core economic weapons, on the one hand, and the unilateral imposition of new terms of employment without a bargaining agreement. Finally, there is no basis for the court's assumption that antitrust law threatens multi-employer bargaining. Congress specifically intended employer associations to remain subject to the

antitrust laws. A carefully tailored exemption that preserves antitrust scrutiny for the concerted imposition of employment terms leaves employer associations free to resort to a panoply of economic weapons to achieve their preferred results through the collective bargaining process.

The expansive antitrust exemption devised by the Court of Appeals would create perverse incentives for both employers and employees that would inevitably lead to a breakdown of collective bargaining relationships in direct contravention of the NLRA. The potential for harm to labor-management relations from such blanket immunity is evidenced by the recent turbulent experience throughout professional sports. Such strife confirms that the broad exemption adopted below cannot possibly advance the goals of national labor policy.

Accordingly, this Court should reverse the judgment below. A properly limited nonstatutory labor exemption shields concerted restraints on employment terms only when employees consent to those restraints through a written collective bargaining agreement. Consistent with the exemption's basis in employee consent, the antitrust immunity should end when the parties' bargaining agreement has expired and the employees have indicated that they no longer consent to the continuation of such concerted restraints.

ARGUMENT

Courts have no license to ignore one federal statute in favor of another: They must give effect to both laws whenever possible. *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). That fundamental principle of statutory construction has particular force when applying the Sherman Act—the basic expression of our national belief that "[t]he preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992). In the Sherman Act, Congress intended to exercise its commerce power to the

maximum extent permitted by the Constitution. *McLain v. Real Estate Bd.*, 444 U.S. 232, 241-42 (1980).

Implied repeals of the Sherman Act are therefore highly disfavored. "Implied antitrust immunity," this Court has held, "can be justified only by *a convincing showing of clear repugnancy*" between the Sherman Act and the competing statute. *National Gerimedical Hosp. v. Blue Cross*, 452 U.S. 378, 388 (1981) (emphasis added). *See Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963) ("Repeal is to be regarded as implied only if necessary to make the [competing statute] work, and even then *only to the minimum extent necessary*," since "the proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another *rather than holding one completely ousted.*") (emphasis added); *Borden Co.*, 308 U.S. at 198-99. *See also Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979) (all antitrust exemptions, including implied exemptions, must be narrowly construed).

These recognized principles define the contours of the nonstatutory labor exemption. As an implied repeal of the Sherman Act, the exemption is justified only to the extent that "labor policy requires," *Connell Construction Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 622 (1975), and only when application of the antitrust laws affirmatively "conflicts with" the NLRA's collective bargaining scheme, *United Mine Workers v. Pennington*, 381 U.S. 657, 666 (1965). *See also Group Life & Health*, 440 U.S. at 231 (citing *Connell Construction*).

There is no conflict between the Sherman Act and the NLRA that demands the total ouster of antitrust from the collective bargaining relationship. Only a limited nonstatutory exemption—one that immunizes employer restraints on labor terms when embodied in a collective bargaining agreement—is faithful to this Court's precedents and fully effectuates both the antitrust and labor laws. The blanket immunity decreed by the majority below—immunity triggered by nothing more than the

employees' decision to engage in collective bargaining—will, in truth, frustrate the purposes of the NLRA by perverting the incentives for constructive collective bargaining.

I. THE SHERMAN ACT AND THE NLRA ARE FULLY HARMONIZED WHEN THE NONSTATUTORY LABOR EXEMPTION IMMUNIZES ONLY THOSE RESTRAINTS ON EMPLOYMENT TERMS THAT ARE CONTAINED IN COLLECTIVE BARGAINING AGREEMENTS.

A. The Development of the Labor Exemption Demonstrates That Employee Consent Is Essential To Immunize Restraints on Employment Terms.

The derivation and application of the nonstatutory exemption demonstrate that *employee consent embodied in a written agreement* is required before the exemption will shield a concerted restraint on competition among employers over the substantive terms of employment.

1. *This Court Has Recognized Only a Limited Nonstatutory Exemption No Broader Than Necessary To Protect Employees' Interests in Bargaining Collectively for the Elimination of Competition Over Employment Terms.*

The NLRA embodies a congressional policy favoring collective bargaining to resolve labor disputes that would otherwise threaten industrial peace. *See* 29 U.S.C. § 151. The Act gives employees the right to organize for collective bargaining purposes, *see id.* §§ 151, 157, and imposes duties on labor organizations and employers to bargain in good faith over wages, hours and other terms and conditions of employment. *Id.* § 158(d). The "basic theme" of the NLRA is to promote collective bargaining "leading . . . to mutual agreement." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970).

Despite its name, the "nonstatutory" labor exemption actually derives from the statutory protections for labor contained in §§ 6 and 20 of the Clayton Act, 15 U.S.C.

§ 17 and 29 U.S.C. § 52 (exempting labor organizations from the Sherman Act and prohibiting courts from enjoining certain labor activities) and the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (barring courts from prohibiting certain specified activities related to labor disputes). These protections—together the so-called "statutory labor exemption"—were enacted by Congress in response to early court decisions upholding antitrust actions against labor unions. *See Allen Bradley Co. v. Electrical Workers*, 325 U.S. 797, 806 (1945); *United States v. Hutcheson*, 312 U.S. 219, 232 (1941).[9] The statutory labor exemption safeguards "the rights of labor to organize to better its conditions through the agency of collective bargaining." *Allen Bradley Co.*, 325 U.S. at 806.

The nonstatutory exemption is a narrow, judicially implied extension of the statutory protections for labor. Like the statutes from which it grew, "[t]he nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions." *Connell Construction*, 421 U.S. at 622. This Court recognized that an implied exemption was necessary because labor's statutory antitrust immunity protects only unilateral actions taken by labor organizations and not "agreements between unions and nonlabor parties." *Ibid. See H.A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 713-15 (1981); *United Mine Workers v. Pennington*, 381 U.S. at 662; *Hutcheson*, 312 U.S. at 232.

The statutory exemption by its terms thus does not protect the fruit of the NLRA's bargaining regime—the

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[9] This Court upheld antitrust liability for union activities in the "Danbury Hatters' Case," *Loewe v. Lawlor*, 208 U.S. 274 (1908), and for the next three decades, the Sherman Act was successfully used to thwart strikes and secondary boycotts by labor organizations. *See, e.g., Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n*, 274 U.S. 37 (1927); *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

collective bargaining agreement. This Court, however, has presumed that Congress intended to exempt collective bargaining agreements from the Sherman Act, since it would frustrate the policies of the NLRA and defeat the purposes of the statutory labor protections if collective bargaining agreements successfully concluded through labor-management negotiations were subject to attack as combinations in restraint of trade. *See Local No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965) (opinion of White, J.) ("Employers and unions are required to bargain about wages, hours, and working conditions, and this fact weighs heavily in favor of antitrust exemption for *agreements* on these subjects.") (emphasis added); *id.* at 711-12 (opinion of Goldberg, J.) ("To tell the parties that they must bargain about a point but may be subject to antitrust penalties if they reach an *agreement* is to stultify the congressional scheme.") (emphasis added).

Accordingly, the Court has held that "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer *agreements* be accorded a *limited* nonstatutory exemption from antitrust sanctions." *Connell*, 421 U.S. at 622 (emphasis added). *See Pennington*, 381 U.S. at 664 (the nonstatutory exemption was designed to ensure "that a union may conclude a wage *agreement*" without violating the antitrust laws) (emphasis added).[10]

Just as the impetus for the exemption was to safeguard employees' labor law rights, the rationale for the exemp-

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[10] The exemption may also extend to other written agreements between labor organizations and employers that do not establish terms or conditions of employment—*i.e.*, agreements that are not collective bargaining agreements—where such agreements are necessary to implement the employees' labor law objectives. *See Richards v. Neilsen Freight Lines*, 810 F.2d 898, 905-06 (9th Cir. 1987) (Kennedy, J.).

tion does not support immunity for employers when they impose employment terms to which there is no employee "agreement." Reciprocal protection is required for employers as parties to collective bargaining agreements, since employers would otherwise face a strong disincentive to completing and abiding by such agreements and employees would again lose the benefits of collective bargaining. But when employers combine together as a group to impose labor terms unilaterally in the exercise of their own business interests, they are not entitled to protection under this Court's reasoning. Like the statutory exemption for labor, which applies only "[s]o long as a union acts in its self-interest," *Hutcheson*, 312 U.S. at 232, the nonstatutory exemption is no broader than necessary to shield restraints on labor competition that are successfully negotiated by employees "in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups." *Jewel Tea*, 381 U.S. at 689-90 (opinion of White, J.).[11]

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[11] Where multi-employer groups have sought to exploit a bargaining relationship to further their own business interests, this Court has forcefully refused to immunize such conduct from antitrust review. *See United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949) ("benefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires"); *Pennington*, 381 U.S. at 655 ("the law contemplates agreements on wages . . . between the union and employers in a multiemployer bargaining unit," but "because they must bargain does not mean that [they] may disregard other laws"). Indeed, only once, in *Jewel Tea*, *supra*, has the Court held a restraint that was embodied in a collective bargaining agreement immunized under the nonstatutory exemption. In *Connell*, *Pennington* and *Allen Bradley*, the Court upheld antitrust challenges to restraints that *were* embodied in agreements with labor organizations, including bargaining agreements.

2. *Following This Court's Precedents, Most Lower Courts Have Properly Immunized Multi-Employer Restraints on Employment Terms Only When Employees Have Agreed To the Restraints Through Bona Fide Collective Bargaining.*

The four cases in which this Court has construed the nonstatutory exemption all involved antitrust challenges to union conduct. *See Connell, Pennington, Jewel Tea, Allen Bradley, supra.*[12] In applying the principles developed in these precedents, however, numerous lower courts have addressed the exemption's possible application to labor restraints unilaterally imposed by employer groups like the NFL.

Until recently, the lower courts were unanimous in refusing to extend antitrust immunity to such restraints. Consistent with the strictly limited form of implied immunity recognized by this Court, the lower courts have correctly reasoned that the nonstatutory exemption shields anti-competitive employer restraints on labor terms and conditions only where such terms are the subject of labor-management agreements and are the product of good faith collective bargaining.[13] Most commentators, too,

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[12] *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983), involved an antitrust action by unions challenging concerted employer conduct in the labor market. Although the employers raised the nonstatutory labor exemption, the Court held that the unions lacked antitrust standing and did not address the exemption issue. *Id.* at 539-42 & n.43.

[13] *See, e.g., Mackey v. NFL*, 543 F.2d 606, 614 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Carpenters Local No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 530-31 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983); *Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades Dist. Council*, 817 F.2d 1391, 1394 (9th Cir. 1987); *In re Detroit Auto Dealers Ass'n*, 955 F.2d 457, 462-67 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992); *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1198 (6th Cir. 1979); *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 964-65 (D.N.J. 1987); *Zimmerman v. NFL*, 632

have supported this formulation of a strictly limited nonstatutory exemption coextensive with employees' consent.[14]

The panel's decision below, however, is one of three recent decisions in which courts have cut the judge-made exemption loose from its required mooring in employer-employee agreement. *See* Pet. App. 19a (rejecting any notion that "union *agreement* ought to be a precondition to any invocation of the nonstatutory labor exemption") (emphasis in original). *See also National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995), *pet. for cert. pending*, No. 95-137; *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991). These courts' decisions expanding the exemption to cover any ongoing "collective bargaining relationship," Pet. App. 10a; *NBA v. Williams*, 45 F.3d at 693; *Powell v. NFL*, 930 F.2d at 1302, betray this Court's precedents and cannot be squared with the strict rules of statutory construction that govern the scope of such implied antitrust exemptions.

B. The Goals of the Sherman Act Are Promoted By Affording Antitrust Scrutiny To Restraints on Employment Terms Imposed By a Multi-Employer Cartel Without Employee Consent.

The limited nonstatutory exemption developed by this Court and most lower courts—an exemption that shields concerted multi-employer restraints on employment terms

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F. Supp. 398, 406 (D.D.C. 1986); *Smith v. Pro Football, Inc.*, 420 F. Supp. 738, 742 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978).

[14] *See, e.g.*, Lee Goldman, *The Labor Exemption to the Antitrust Laws as Applied to Employers' Labor Market Restraints in Sports and Non-Sports Markets*, 1989 Utah L. Rev. 617, 658-59; Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 Duke L.J. 339, 376; Note, *Releasing Superstars From Peonage: Union Consent and the Nonstatutory Labor Exemption*, 104 Harv. L. Rev. 874 (1991). *But see* Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 Geo. L.J. 19 (1986).

only when they are contained in bona fide collective bargaining agreements—satisfies the basic principle of statutory construction that requires courts to give effect to the Sherman Act whenever possible. Thus limited, the exemption effectuates the Sherman Act by preserving as far as possible the application of antitrust law to labor markets.

The Sherman Act prefers competition wherever there exists an economically significant market for the provision or acquisition of goods or services. *See, e.g., FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 422-23 (1990) (Sherman Act fully applicable to concerted restraints on competition for the provision of services).[15] Thus, but for its broad construction of the labor exemption, the Court of Appeals "recognize[d]" that petitioners would have a cause of action against respondents for their salary-fixing scheme. *See* Pet. App. 24a ("We recognize, of course, that, as a general matter, the antitrust laws may apply to restraints on competition in non-unionized labor markets."); *id.* at 35a-41a (Wald, J., dissenting).

The Sherman Act's reasonableness test is almost infinitely adaptable, applying as well to the *purchase* of goods or services as to their *sale*. As this Court's decisions have long shown, the Sherman Act does not codify any hard and fast demarcation between the labor market and other economically meaningful markets, *see e.g., Radovich v. NFL*, 352 U.S. 445 (1957); *Anderson v. Shipowners' Ass'n*, 272 U.S. 359 (1926); 2 Phillip

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[15] *See also National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978): "The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. The heart of our national economic policy long has been faith in the value of competition. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." *Id.* at 695 (internal quotation marks and citation omitted).

Areeda & Donald F. Turner, *Antitrust Law* ¶¶ 338b & 338c (1978)—just as it draws no bright lines between different stages of the production process for goods or services, whether the purchase of inputs or the final sale of outputs, *see, e.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

In *Anderson v. Shipowners' Ass'n, supra*, the Court held that a member of a seamen's union could challenge under the Sherman Act uniform terms and conditions of employment imposed by associations of competing owners of merchant marine vessels. The associations imposed a registration requirement as well as other restrictions on the hiring and assignment of seamen, including an agreement to "fix the wages which shall be paid the seamen." 272 U.S. at 362; *see id.* at 361-62. The Court did not hesitate to conclude that such a combination would violate § 1. *Id.* at 364-65 (because "each shipowner and operator in this widespread combination has surrendered his freedom of action in the matter of employing seamen and agreed to abide by the will of the associations," "it follows . . . that the combination is in violation of the Anti-Trust Act").

With direct significance to respondents and the market for professional sports services, the Court held in *Radovich v. NFL, supra*, that a former NFL player properly stated an antitrust claim for damages against the NFL clubs based on allegations that the clubs had colluded to blacklist him for playing in a rival league and violating his player contract. 352 U.S. at 446-48. Among other things the clubs were alleged to have restrained competition by "us[ing] a standard player contract which prohibits a player from signing with another club without the consent of the club holding the player's contract"—a restraint that was "enforced by agreement of the clubs to black-list any player violating [his contract] and to visit

severe penalties on recalcitrant member clubs." *Id.* at 449. The Court concluded that these restraints imposed by the NFL on competition for player services "are within the coverage of the antitrust laws," *id.* at 448, and "need only be tested under the Sherman Act's general prohibition on unreasonable restraints of trade," *id.* at 453 (internal quotation marks omitted). *Accord United States v. International Boxing Club*, 348 U.S. 236 (1955). *See also Flood v. Kuhn*, 407 U.S. at 284 (adhering to holding of *Radovich* that antitrust laws apply to restraints on labor market in professional football).[16]

As Judge Wald cogently explained in dissent below, *see* Pet. App. 39a-41a, economic theory fully supports application of § 1 to agreements among competing purchasers to fix the prices to be paid for labor and other inputs, particularly in industries such as professional sports and entertainment that are characterized by competitive bidding among employers for talented employees whose skills are highly differentiated. Where a group of employers, such as the NFL owners, comprises the only purchasers of the unique services of employees like professional football players or talented entertainers, salary collusion by the employers represents an exercise of monopsony power that robs employees of their fair market value and will inevitably result in a decline in the quality of the product sold to consumers. *See* Roger D. Blair & Jeffrey L. Harrison, *Monopsony* 42-44, 72 (1993). *See also* Richard A. Posner & Frank H. Easterbrook, *Antitrust* 150 (1981); *Mandeville Island Farms*, 334 U.S. at

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[16] *See also Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183-89 (D.C. Cir. 1978) (NFL draft violates § 1); *Mackey v. NFL*, 543 F.2d at 616-18, 622 ("Rozelle Rule" restraint on player mobility violates § 1); *McNeil v. NFL*, 790 F. Supp. 871 (D. Minn. 1992) (§ 1 applies to NFL "Plan B" restraints on free agency); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975) (refusing to dismiss antitrust challenge to NBA draft and reserve system); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972) (National Hockey League reserve clause violates antitrust laws).

240-43 (explaining the anticompetitive characteristics of collusive monopsony).[17]

Nevertheless, the majority below failed to make any effort whatsoever to give effect to the Sherman Act within the broad boundaries of the collective bargaining relationship. That the wholesale ouster of antitrust law announced by the majority below totally ignores the objectives of the Sherman Act is startingly apparent in this case where the NFL clubs' exercise of monopsony power cut the salaries paid to developmental squad players to less than one-fifth the level that would have prevailed absent the clubs' concerted elimination of competition.

C. An Exemption Based on Employee Consent Serves the Terms and Intent of the NLRA.

Firmly mooring the nonstatutory antitrust immunity to employee consent also fully comports with the terms of the NLRA and with congressional intent as construed in this Court's recent implied labor preemption decisions.

1. *A Consent-Based Exemption Protects Employees' Rights Under § 7 of the NLRA.*

Section 7 of the NLRA expressly grants employees "the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157. The statute also guarantees employees "the right to refrain from any or all of such activities." *Ibid.* The declared policies of the Act, moreover, include "protecting the exercise by workers of full freedom of association [and] self-organization" as well as "encouraging the practice and procedure of collective bargaining." *Id.* § 151.

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[17] Indeed, in the worlds of sport and entertainment, where the performer *is* the product, a competitive market for performers' services is conducive to consumer welfare because it stimulates the development of new talent and results in greater opportunity for performers to realize the best use of their talents. Employer collusion to eliminate competition and deny performers the market value of their services is thus directly harmful to the interests of fans.

Section 7 thus requires that all employees have a free and equal right to choose whether to organize for collective bargaining. In accordance with that clear statutory mandate, this Court has held that the NLRA will not tolerate any rule or policy judgment that predicates benefits or the legal rights of individual employees on the exercise of the § 7 right to organize or refrain from organizing. *E.g., Livadas v. Bradshaw*, 114 S. Ct. 2068 (1994). In *Livadas*, the Court struck down a state policy that "placed a penalty on the exercise" of § 7 rights by forcing employees to choose between the enforcement of a state-law remedy and the § 7 right to collective bargaining. *Id.* at 2073, 2075. "This unappetizing choice," the Court concluded, "was not intended by Congress and cannot ultimately be reconciled with [the] statutory scheme" of the NLRA. *Id.* at 2075 (citation omitted).

The narrow form of implied antitrust immunity developed in this Court's labor exemption decisions promotes the terms and policies of § 7. If the employees' waiver of their individual antitrust rights occurs only when they collectively agree to employment terms through the consent of their bargaining representative, rather than upon the mere exercise of their § 7 right to engage in collective bargaining, the employees' exercise of the § 7 right to choose will remain free and unimpeded. *See* 114 S. Ct. at 2082 (state-law right to severance pay that "treated all employees equally, whether or not represented by a labor organization," and that was "relinquished . . . only by the parties' express agreement on different terms" was fully compatible with the NLRA) (discussing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 22 (1987)). *See also Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) ("It would turn the [NLRA] on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from [other legal rights].").

2. *The Limited Exemption Preserves the Legal "Backdrop" for Collective Bargaining That Congress Intended To Maintain.*

A consent-based exemption promotes the bargaining scheme of the NLRA for a second, closely related reason: As this Court's labor preemption decisions make clear, Congress intended collective bargaining to take place against the "backdrop" of generally applicable laws that affect union and nonunion employees equally without directly encouraging or discouraging collective bargaining. *See Livadas*, 114 S. Ct. at 2081-82; *Fort Halifax*, 482 U.S. at 21; *Metropolitan Life*, 471 U.S. at 757. The Court in *Livadas*, for example, specifically approved of lower court decisions holding that the NLRA forbids any attempt to deny union employees or employers the protection of generally applicable laws, such as trespass laws, even when such denial might lead to increased bargaining over labor disputes. 114 S. Ct. at 2081 (discussing *Rum Creek Coal Sales, Inc. v. Caperton*, 971 F.2d 1148, 1154 (4th Cir. 1992)). *See also New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 533 (1979) (opinion of Stevens, J.) (unemployment benefits law of "general applicability" not preempted by NLRA even though it provided special benefit scheme for strikers).

Employees are entitled to rely on the generally applicable legal backdrop unless and until they are able to secure preferable terms through bargaining.[18] Therefore, the Court has made it quite clear that in the event of a bargaining impasse, *the background legal standards come*

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[18] "Accordingly, it never has been argued successfully that minimal labor standards imposed by other federal laws were not to apply to unionized employers and employees." *Metropolitan Life*, 471 U.S. at 755. *See also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974) (collective bargaining does not foreclose exercise of employee's anti-discrimination rights under Title VII); *In re Establishment Inspection of Caterpillar, Inc.*, 55 F.3d 334 (7th Cir. 1995) (NLRA does not preclude unionized employee from participating in OSHA safety inspection of employer's premises during pendency of strike).

into play. *See Fort Halifax*, 482 U.S. at 20-22. *See also Livadas*, 114 S. Ct. at 2081 (collective bargaining is not "served by forcing employees or employers to bargain for what they would otherwise be entitled to" under generally applicable laws).

This Court's decisions in *Radovich v. NFL* and *Anderson v. Shipowners' Ass'n*, *supra*, are sufficient to show that the requirements of the Sherman Act, like other forms of substantive federal regulation, are appropriately treated as part of the relevant "backdrop" of legal rights and obligations applicable in the context of collective bargaining between the NFL and the players. The Sherman Act is a generally applicable law that applies equally to unionized and nonunion labor markets and is not directly aimed at encouraging or discouraging collective bargaining. The Sherman Act protects from unreasonable restraint all meaningful competition over wages and other terms of employment where such competition is not foreclosed by a collective bargaining agreement. It requires in the present case that the salaries over which the players and the League will bargain, and which the clubs may impose upon impasse, may not start from a level that is collusively fixed by the clubs in a unilateral effort to eliminate competitive market forces.

The fact that the players may expressly *waive* their antitrust rights by a collective bargaining agreement in no way means that Congress intended the Sherman Act to apply with any less force than other background federal rights that cannot be waived. *Cf. Gardner-Denver*, 415 U.S. at 51 (Title VII civil rights are not waivable). Quite the contrary, in *Fort Halifax*, *supra*, the Court concluded that the waivability of a background right made the competing statutory scheme even *more* compatible with the NLRA. 482 U.S. at 22. If anything, that principle applies with greater force when the background law is a paramount federal statute like the Sherman Act.

II. THERE IS NO CONFLICT BETWEEN THE SHERMAN ACT AND THE NLRA THAT JUSTIFIES AN ANTITRUST EXEMPTION BASED ON THE MERE EXISTENCE OF A COLLECTIVE BARGAINING RELATIONSHIP, AND SUCH BLANKET IMMUNITY WOULD AFFIRMATIVELY HARM THE POLICIES OF THE NLRA.

The majority below followed the lead of the Second Circuit in *NBA v. Williams*, 45 F.3d 684 (2d Cir. 1995), and held that from "the inception of a collective bargaining relationship," Pet. App. 24a—that is, from the moment the players first exercised their § 7 right to form the Players Association—the players lost their remedies under the Sherman Act. There is no clear "repugnancy" between the Sherman Act and the NLRA that necessitates such blanket antitrust immunity for respondents' nonconsensual imposition of a fixed salary. In truth, this rule is actually contrary to fundamental policies of labor law and can only undermine the foundations of collective bargaining.

A. None of the Reasons Offered By the Court of Appeals Supports a Blanket Exemption for Unilateral Multi-Employer Restraints.

The court below based its decision on an assortment of supposed inconsistencies between the "process" of collective bargaining and the "[i]njecti[on]" of the Sherman Act into that process. *Id.* at 20a. These purported inconsistencies vanish upon inspection.

1. *A Judicial Desire To Adjust the Balance of Power Between Employees and Employers Is Not a Legitimate Basis for Ousting Antitrust Law.*

The majority believed that antitrust rights for unionized employees might disrupt "the delicate balance of countervailing power" between unions and employers "by giving unions a powerful new weapon . . . to gain an advantage

in bargaining." *Id.* at 19a-20a. Only Congress is empowered to make such a bold policy judgment. The NLRA flatly denies to courts (as well as to the NLRB) any "authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of [an] assessment of that party's bargaining power." *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317 (1965). *See also Charles D. Bonanno Linen Serv. v. NLRB*, 454 U.S. 404, 418 (1982); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 497 (1960). Accordingly, judicial views about the most desirable balance of bargaining power have no legitimate place in the exemption analysis. The Court of Appeals' attempt to calibrate this balance by giving employers an unlimited right to antitrust immunity overtly confers tremendous power in the opposite direction, toward employers—power that is arguably much greater than the bargaining power employees gain from the ability to file an antitrust suit, particularly since antitrust suits challenging restraints on competition for labor services have no guarantee of success.

What is more, this Court has repeatedly recognized that antitrust claims that arise during collective bargaining are *not* foreclosed by the NLRA. In *Connell Construction, supra*, the Court determined that an employer could pursue antitrust treble damages against a union while simultaneously seeking remedies from the NLRB for the union's alleged violations of § 8(e) of the NLRA, 29 U.S.C. § 158(e). The Court found nothing in the statute or its legislative history even "suggesting" that "Congress thought allowing antitrust remedies . . . would be inconsistent with the remedial scheme of the [labor laws]." 421 U.S. at 634. *See also Jewel Tea*, 381 U.S. at 687-88 (opinion of White, J.). *Accord Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 85 (1982); *Federal Maritime Comm'n v. Pacific Maritime Ass'n*, 435 U.S. 40, 61 (1978).

2. *Collective Representation and Individual Antitrust Rights Are Not Mutually Exclusive.*

The majority below also reasoned that "[o]nce employees organize a union, federal labor law necessarily limits the rights of individual employees to enter into negotiations with their employer," Pet. App. 24a, and this limitation implicitly precludes the employees from bringing an antitrust challenge based on the employers' collusive denial of individual negotiating rights. *See id.* at 24a-25a.[19]

Where there is no agreement on bargaining terms, however, there is no inconsistency between collective representation and the simultaneous pursuit of individual rights. That is plainly true in the NFL and other professional sports leagues, where players' associations have always acted to preserve the players' ability to negotiate their own individual salaries in a competitive market. This Court has stressed that employees may collectively "reserve a field for the individual contract," *J.I. Case Co. v. NLRB*, 321 U.S. 332, 336 (1944), and that in industries like sports and entertainment, the "great variation in circumstances of employment or capacity of employees" makes it appropriate "for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining." *Id.* at 338. That freedom to choose undermines any argument that collective bargaining necessarily precludes the exercise of individual antitrust rights to remedy a con-

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[19] The genesis of this argument—indeed, the genesis of the very rule of immunity adopted below and in *Williams*—is in Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 Yale L.J. 1 (1971). *See id.* at 9. One of the co-authors of this article later became the author of the three Second Circuit opinions expanding the scope of the nonstatutory exemption. *See Williams, supra; Caldwell v. American Basketball Ass'n*, 66 F.3d 523 (2d Cir. 1995) (Winter, J.), *pet. for cert. filed*, No. 95-1012 (Dec. 20, 1995); *Wood v. National Basketball Ass'n*, 809 F.2d 954 (2d Cir. 1987) (Winter, J.).

certed salary-fixing restraint unilaterally imposed by competing employers.[20] To the extent that competition remains in the unionized labor market by virtue of the employees' lack of consent to its elimination, antitrust law can protect it, just as antitrust law protects competition in nonunion labor markets.

3. *The Application of Antitrust Law To the Unilateral Imposition of Terms Will Not Interfere With Any Employer "Right" Protected By the NLRA.*

Next, the court reasoned that employers enjoy an affirmative "right" under the NLRA to act in concert to impose labor terms upon impasse, Pet. App. 23a, and that antitrust law would necessarily interfere with this right and therefore could not be allowed to intrude into the labor province. The court was mistaken.

The employers' ability to impose terms upon impasse is not a "right" conferred and protected by the NLRA. It is simply an exercise of the employers' residual, common law rights to operate their businesses. "Absent a collective bargaining agreement . . . state common law generally permits an employer to run the work-place as it wishes." *Fort Halifax*, 482 U.S. at 21. The common law generally recognizes an employer's unilateral right to alter employment terms, including wages.[21] Although the employer's and the employees' bargaining representatives

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[20] *See also* Jacobs & Winter, *supra*, at 9-10 (one "important qualificatio[n]" to the argument advanced by the majority below is that "while the concept of an exclusive bargaining representative forecloses individual bargaining at the option of individual employees, it does not foreclose the collective bargain from leaving certain issues to be resolved by individual bargaining").

[21] *See, e.g., Nicosia v. Wakefern Food Corp.*, 643 A.2d 554, 559 (N.J. 1994); *Sanchez v. Life Care Ctrs.*, 855 P.2d 1256, 1259 (Wyo. 1993); *German v. Commonwealth*, 574 N.E.2d 336, 339 (Mass. 1991); *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986); *Facelli v. Southeast Mktg. Co.*, 327 S.E.2d 338, 339 (S.C. 1985).

"may enter negotiations designed to alter this state of affairs, . . . if impasse is reached, the employer may rely on pre-existing state law to justify its authority to make employment decisions." *Fort Halifax*, 482 U.S. at 21.[22] The majority's decision inequitably allows the NFL clubs to exercise their "backdrop" right to make unilateral changes in employment terms but precludes petitioners from exercising rights that they equally enjoy under the backdrop of applicable law. Since the League's "right" to impose the fixed salary on petitioners derives from the common law rather than the NLRA, subjecting the exercise of that right to the requirements of the Sherman Act presents no more of a conflict with the labor law than did subjecting the employer's right of post-impasse implementation to the state severance pay law in *Fort Halifax*.

The majority asserted that unilateral implementation is a core "economic weapon" available to the employers, no different from lockouts or other economic pressure tactics that are integral to the bargaining process. Drawing by analogy on *Machinists v. Wisconsin Emp. Relations Comm'n*, 427 U.S. 132, 141 (1976), the court reasoned that unilateral implementation is among the core economic weapons that Congress intended to leave unregulated, even from antitrust review. Pet. App. 5a, 18a, 23a.

That is precisely the reasoning this Court discredited in *Metropolitan Life, supra,* when it rejected the proposition that a "law that interferes with the end result of bargaining is . . . even worse than a law that interferes with the bargaining process." 471 U.S. at 752. Refusing to hold preempted a state law that established a minimum term of employment, the Court drew a clear

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[22] "Impasse" is defined as "that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless." *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988) (internal quotation marks omitted).

line between the "bargaining process" and the "end result of bargaining." *Ibid.* The Court held that there is "[n]o incompatibility" between the NLRA and "state or federal legislation that imposes minimal substantive requirements on contract terms." *Ibid.*

As Judge Wald demonstrated, Pet. App. 53a-54a, economic weapons like strikes and lockouts are qualitatively different from unilateral employer action, such as, for example, an employer's permanently subcontracting out certain jobs or permanently changing the terms of employment for its own employees who perform those jobs. Strikes and lockouts are means to the end; they almost always stimulate the bargaining process by bringing the parties back to the table, in part precisely because these tactics are painful for *both* sides. In sharp contrast, the unilateral imposition of the employers' preferred terms is an end in itself, principally designed to serve the employers' business interests rather than to influence the bargaining process. Although certainly painful to employees, it imposes no reciprocal costs on the employers and is thus a one-sided substitute for a bargaining agreement, not a tactic calculated to spur the parties to constructive compromise. In the present case, indeed, respondents have never even tried to claim—nor could they plausibly do so—that the concerted imposition of a $1,000 per week salary for developmental squad players was designed to draw the Players Association back to the bargaining table.

Thus, with direct relevance to the imposition of terms at impasse, the Court held in *Fort Halifax, supra,* that a state severance pay requirement was not preempted even though it specifically applied by its terms in the event unionized employers and employees reached impasse in collective bargaining. 482 U.S. at 21. Although the state law provided statutory minimum terms that presumably overrode the employers' ability to impose their own proposals upon impasse, the Court nevertheless concluded that the statute did "not impermissibly intrude

upon the collective bargaining process." *Ibid.* *Fort Halifax* negates the Court of Appeals' logic, yet the majority did not even mention the case.

4. *Multi-Employer Bargaining Is Not Threatened By an Antitrust Exemption Limited To Consensual Restraints on Labor Terms.*

Finally, drawing liberally from the *Williams* opinion, the majority below concluded that antitrust law is incompatible with the NLRA because it would hamstring multi-employer bargaining in contravention of congressional intent. Pet. App. 25a-29a (quoting *Williams*, 45 F.3d at 689-92).[23] According to *Williams*: (1) multi-employer bargaining has long been "commonplace and essentially unchallenged," 45 F.3d at 688; (2) Congress approved of membership in employer organizations in 29 U.S.C. § 104(b); (3) to be effective, a multi-employer association must "jointly establish and maintain a unified front in dealing with a common union," *id.* at 689; and (4) in *NLRB v. Truck Drivers Local No. 449 ("Buffalo Linen")*, 353 U.S. 87 (1957), this Court upheld the NLRB's ruling that the members of an employer association do not commit an unfair labor practice by locking out their employees in response to a "whipsaw" strike by a union, *id.* at 694.[24] Stringing together these premises, the Second Circuit jumped to the conclusion that in enacting the labor laws, Congress must have intended to preclude application of antitrust review to all concerted labor market activities of multi-employer associations. *Id.* at 690-92.

In truth, however, there is no basis for concluding that multi-employer bargaining necessarily trumps any and all requirements of the Sherman Act, nor is the collective

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[23] This argument, too, had its origin in the Jacobs & Winter article. *See* 81 Yale L.J. at 22.

[24] A "whipsaw" strike occurs when a union strikes individual members of a multi-employer bargaining unit separately in order to put maximum economic pressure on the employers.

bargaining scheme of the NLRA threatened in any way by a rule that subjects to antitrust scrutiny restraints on employment terms that are unilaterally imposed by a multi-employer group.

The labor laws provide no statutory underpinning for the *Williams* reasoning. The only labor provision remotely applicable to the issue before the Court is § 4(b) of the Norris-LaGuardia Act, 29 U.S.C. § 104(b), which merely bars the issuance of injunctions prohibiting any person from becoming or remaining a "member of any labor organization or of any employer organization." Section 4(b) may protect membership in multi-employer organizations and even the ability of the employer-members to commit themselves jointly to a common bargaining position, but it does not imply any intent by Congress to protect joint conduct by employers to restrain competition over terms of employment.

Indeed, the *Williams* analysis collides head-on with the legislative history of the Norris-LaGuardia Act, which refutes any notion that Congress intended a broad repeal of the antitrust laws for all bargaining conduct by multi-employer associations. In adopting the Norris-LaGuardia Act, including its prohibition on injunctions against membership in employer organizations, Congress overwhelmingly defeated a proposed amendment that would have granted employers "full freedom of association [and] self-organization" for their own "mutual aid or protection," 75 Cong. Rec. 4762 (1932) (proposal of Sen. Hebert on behalf of the minority of the Senate Judiciary Committee). Senator Norris, the chief sponsor of the Act, criticized the amendment on the ground that it might invite employers to claim that "Congress [had] relieved them from all responsibility of organization under the Sherman Anti-trust Act." *Id.* at 4764. Other members of the Judiciary Committee expressed similar concerns. *See id.* at 4765 (statement of Sen. King) (the proposed language "[c]ould be construed to mean that

employers had the right to combine, and in such a manner as would be violative of either the Clayton or the Sherman antitrust laws"); *id.* at 4763 (statement of Sen. Walsh) ("Of course, employers ought to have perfect freedom of association, so long as they do not trench upon the Sherman Act."). Immediately following this debate, the amendment was roundly defeated, suggesting that Congress quite clearly did not intend for multi-employer bargaining by itself "to relieve employers of any liability under the antitrust laws." James M. Altman, *Antitrust: A New Tool for Organized Labor?*, 131 U. Penn. L. Rev. 127, 153 (1982).

Notwithstanding the absence of a blanket immunity for all actions taken by multi-employer bargaining associations, this kind of bargaining relationship has become commonplace. In the context of professional sports and entertainment, where organized employees exercise the right afforded by labor law to preserve areas for individual negotiations, *see J.I. Case, supra,* the availability of antitrust remedies has fostered constructive bargaining settlements between the two sides. In the more traditional bargaining context, where labor organizations seek standardized industry-wide compensation terms, post-impasse implementation of employment terms by employer associations has not elicited significant antitrust challenge to date and is unlikely to do so in the future. The reason is that the employees as well as the employers in those industries accept the legitimacy of common employment terms for all employees (however much they may disagree about the specific figures).

Reversal of the Court of Appeals' decision is thus unlikely to spur employer withdrawal from salutary multi-employer bargaining relationships based on supposed fears that post-impasse implementation might now engender antitrust claims. Were such fears to be voiced by employer associations, labor organizations that seek standardized industry-wide terms could presumably enter into agreements that assuage those fears.

Absent employee acceptance of *concerted* employer action, subjecting employment restraints to antitrust scrutiny when they are unilaterally imposed by a group of employers is hardly a wholesale assault on multi-employer bargaining, as the *Williams* court believed. *See* 45 F.3d at 692. The rule petitioners suggest is concerned exclusively with employment terms; it will not interfere with the process of multi-employer bargaining or deny employer associations the use of economic weapons. At impasse, each individual member of the employer association retains its ability unilaterally to implement its own preferred employment terms *without fear of antitrust liability,* since it is only the *collusive* imposition of restraints that runs afoul of the Sherman Act. In addition, the employers could always collectively impose a *reasonable* restraint on labor competition, since the Sherman Act proscribes only those that are *unreasonable.*

In line with *Machinists* and this Court's more recent labor preemption cases, members of a multi-employer bargaining unit retain a panoply of economic weapons that they can exercise collectively free of antitrust scrutiny. *See* Pet. App. 53a-54a n.7 (Wald, J., dissenting). In addition to their ability to commit themselves to joint bargaining positions, they can lock out their employees upon impasse as a defensive measure to protect the integrity of the unit, they can hire replacement workers during such a lockout, and they can contribute to a strike insurance fund.[25] Furthermore, no antitrust liability would arise if the employers acted together upon impasse to withdraw certain benefits contained in an expired bargaining agreement, such as, for example, a minimum salary requirement that may pose an impediment to unilateral action.[26]

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[25] *See NLRB v. Brown,* 380 U.S. 278, 285 (1965); *Buffalo Linen,* 353 U.S. at 97.

[26] As established in *Fort Halifax,* the employers' common law right to withdraw employment benefits after impasse, just like their

Finally, it certainly was not necessary to respondents' multi-employer bargaining efforts to immunize their imposition of the fixed-salary restraint in the present case. Each of the respondent clubs could have separately determined to pay a flat salary for its developmental squad players consistent with the Sherman Act, as long as the League did not act as a cartel to enforce those terms. In addition, the individual clubs were free after impasse to negotiate their own agreements on an interim basis with the Players Association. *Bonanno Linen,* 454 U.S. at 415-16 n.9.

All of these options provide sufficient flexibility for employer associations to bargain jointly for the terms they want. There is simply no clear repugnancy between the Sherman Act and labor law's recognition of multi-employer bargaining that requires the employers to be free to act in restraint of trade by imposing their preferred terms unilaterally as a group.

B. A Blanket Exemption Like That Adopted Below Would Stifle Collective Bargaining and Corrode Labor-Management Relations.

The perverse and destructive incentives that would follow from the labor exemption contemplated by the Court of Appeals are manifest. On the one hand, the exemption would give employers a compelling disincentive against good faith bargaining. Multi-employer associations would be able to impose their own preferred industry-wide employment terms free of any market constraints and without giving up any *quid pro quo* in the bargaining process. Employers would merely have to force labor negotiations to impasse by "going through the motions of bargaining," Pet. App. 47a n.6 (Wald, J., dissenting) (internal quotation marks omitted), since they would have a greater stake in bringing about an impasse than in coming to terms with the employees'

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common law right to impose terms, is always subject to whatever background laws are otherwise applicable to employment terms.

bargaining representative. At the same time, employers would have a perverse interest in fostering and promoting a unionized work force, solely for the purpose of maintaining their antitrust immunity and not out of any fidelity to the goals of the labor laws.

On the other side of the balance, blanket antitrust immunity that is tied to the mere existence of a collective bargaining relationship would place overt pressure on employees to abandon collective bargaining altogether. Where industry-wide employer restraints are sufficiently oppressive, abandoning the bargaining table in favor of the courthouse may be the employees' only effective recourse. That is not merely a hypothetical concern. In the wake of the Eighth Circuit's decision in *Powell v. NFL*, for example, the NFL players promptly decertified the Players Association and went without a collective bargaining agreement for a total of six full seasons while pursuing their antitrust remedies against the League. *See* Pet. App. 30a, 48a. Short of dismantling their association, however, employees would have no choice but to capitulate to the employers' immunized terms, or else take the risk of calling a strike, where the chance of success would be lessened by the absence of any threat of antitrust liability.

As shown, the Court of Appeals' automatic elimination of antitrust rights triggered solely by the employees' decision to engage in collective bargaining is impossible to square with § 7 of the NLRA. *Livadas*, 114 S. Ct. at 2075. *See Metropolitan Life*, 471 U.S. at 756. Indeed, on the facts of the present case, the penalty produced by this rule is particularly stark. Petitioners are a narrow class of practice players who lack majority status and significant clout within the Players Association. They are in no position to force the association to decertify to allow them to pursue their antitrust remedies against respondents—the fanciful option offered by the majority below. *See* Pet. App. 30a.

The incentives created by this total ouster of antitrust cannot help but have a pernicious effect on labor relations in industries organized around multi-employer bargaining, particularly the sports and entertainment industries, where employment terms are individually negotiated within the structure of a collective bargaining relationship. The track record in the sports world in recent years provides a particularly dismal forecast for what will likely come if the Court of Appeals' rule is not reversed. The tumultuous history of the NFL Players Association suggests that under the majority's rule below, labor relations in football may be relegated to a disruptive pattern of bargaining, impasse, decertification, antitrust litigation and settlement, repeated again and again with each contract cycle. That result makes a mockery of the NLRA policy that favors collective bargaining as a means to minimize industrial strife. *See* 29 U.S.C. § 151.

Other sports too can be expected to experience greater labor unrest as a byproduct of the Court of Appeals' decision. In response to the *Williams* opinion, the National Basketball Association owners imposed a lockout in the summer of 1995, and a large faction of NBA players mounted an ultimately unsuccessful attempt to decertify their association. Prior to *Williams*, the NBA had concluded several successive bargaining agreements without a strike or lockout.[27] In the National Hockey League, the owners refrained from unilaterally imposing a proposed league-wide salary cap during a lockout in the 1994-1995 season precisely because of their concern over the potential for antitrust liability. As a result, the players and the owners eventually concluded an agreement that did not include such a restraint.[28] Under

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[27] *See* John Helyar, "Power Plays: Pro Basketball Loses Its 'Feel Good' Image in Nasty Labor Dispute," Wall St. J., Aug. 7, 1995, at A1.

[28] The majority below pointed to the NHL as evidence that bargaining agreements can be reached in professional sports without resort to antitrust litigation, Pet. App. 31a-32a, but that observa-

the Court of Appeals' rule, the NHL owners would have had considerably less incentive to bargain with the players to reach a mutual agreement.

Major league baseball provides the most compelling example. Baseball has long been subject to its own peculiar antitrust exemption as a matter of *stare decisis*. *Flood v. Kuhn*, 407 U.S. 258 (1972). The baseball players' lack of antitrust rights has not produced peaceful labor relations, to say the least. There have been eight rounds of contract negotiations in baseball since 1970, and every one has involved a strike or lockout. The latest baseball strike was the longest work stoppage in professional sports history—to the detriment of fans as much as players and owners—and there is still no agreement in sight.

Similar dislocations can be expected to follow in the entertainment industry. The labor structures in entertainment—involving individual negotiations for talent within the framework of industry-wide collective contracts—are similar to those in sports. And the potential is great for agreements and combinations among production companies that are aimed at suppressing competition for talent and artificially limiting the compensation received by those with the least bargaining power.

If this Court were to adopt the blanket exemption crafted by the majority below, all unionized sports and entertainment employees, as well as the employees in other industries with similar structures, would suddenly find

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tion was sorely mistaken. In fact, the NHL owners themselves have acknowledged the important role that antitrust played in the negotiations. *See* Joe Gordon, "NHLPA Eyes Suit; Owners May Hear Antitrust Charge," Boston Herald, Dec. 25, 1994, at B24 (" 'At the moment we have no plans to implement anything the way the baseball owners did. We don't have the (antitrust) protection they do . . . . We do have the right to implement our final proposal, as long as the proposal is not (tantamount to) a restraint of trade.' ") (quoting Harry Sinden, President-General Manager of the Boston Bruins).

themselves in the same "aberration[al]" antitrust vacuum heretofore inhabited only by baseball. *Flood v. Kuhn*, 407 U.S. at 282.

III. WHERE ANTITRUST IMMUNITY HAS PROPERLY ATTACHED TO EMPLOYMENT TERMS IN A COLLECTIVE BARGAINING AGREEMENT, THE IMMUNITY SHOULD END WITH EXPIRATION OF THE AGREEMENT.

There is no dispute in this case that the Players Association refused to approve the fixed salary for developmental squad players and that respondents' concerted imposition of the $1,000 per week salary was entirely unilateral—triggered as it was by the League's own conclusion that negotiations on the issue had reached impasse. The labor exemption thus cannot properly shield this challenged restraint, and the decision of the Court of Appeals should be reversed.

In deciding this case, the Court should not fail to consider what has become the most important and recurring issue with respect to the labor exemption: the issue of the exemption's expiration.[20] Consistent with the rationale limiting the exemption to restraints on employment terms that receive employee consent as expressed through the terms of a bargaining agreement, the expiration of such an agreement is the proper point for the termination of the implied antitrust immunity. The expiration date agreed to by the parties in their labor contract is the only reliable and legitimate indication of the duration of the employees' consent to the contract's terms.

Contract expiration is a definitive point free of the uncertainty and legal limbo often associated with the determination of impasse. If the exemption ends with the contract, the parties will mutually control the precise

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[20] *See* Note, *Releasing Superstars From Peonage*, 104 Harv. L. Rev. at 886.

scope of their rights, and would be able to bargain specifically for a separate extension or modification of the immunity. Under an impasse test, in contrast, the employers—the very parties who have presumably restrained competition in violation of the Sherman Act—can exercise considerable control over the duration of their own immunity. Moreover, limiting the exemption to the period of the bargaining agreement also gives maximum effect to both the NLRA and the Sherman Act, as required by the principles of statutory construction discussed above. *See Silver v. New York Stock Exchange*, 373 U.S. at 357 (antitrust exemption should be implied "only to the minimum extent necessary").

Lifting the antitrust bar upon expiration will not frustrate the NLRA's bargaining scheme.[30] The prospect of antitrust liability following expiration of the agreement does not conflict with the employers' labor law duty to maintain the status quo until negotiations over a new contract have reached impasse, *see NLRB v. Katz*, 369 U.S. 736, 742-43 (1962). The *Katz* status quo doctrine does not preserve contract terms concerning other mandatory subjects of bargaining, such as arbitration, that represent "a consensual surrender" of rights the parties would otherwise be free to exercise. *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 199 (1991) (internal quotation marks omitted). *See also Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1113-14 (D.C. Cir. 1986) (*Katz* does not apply to union security and dues check-off provisions). In *Litton*, the Court reasoned that, however valuable grievance arbitration may be to employees, since arbitration is "a matter of consent" that involves the relinquishment of the right to a trial in court, the requirements of the provision "will not be imposed upon parties beyond the scope of their agreement." 501 U.S. at 201. So also the employers' immunity for restraints under the labor exemption is "a matter

[30] *Cf.* Pet. App. 22a; *Bridgeman v. NBA*, 675 F. Supp. at 965-66.

of consent" that involves a surrender of the employees' antitrust rights. Under the same reasoning, the exemption should not be imposed on employees "beyond the scope of their agreement."

In any event, *Katz* presents no dilemma for the employers: If the employees through their bargaining representative have told the employers that they want a contract restraint removed immediately at the end of the collective agreement, the employees can hardly charge the employers with bad faith bargaining in violation of § 8 (a)(5) (the basis for the *Katz* status quo doctrine) for having removed the restraint prior to impasse.[31] If negotiations are advancing toward a new contract, moreover, the employees are likely to consent to an extension of the employers' immunity. And as was explained earlier, individual employers, acting on their own, would be able to maintain salary restraints like the one involved in the present case without thereby incurring antitrust liability; they simply could not do so collectively without having to justify the reasonableness of the restraint under the Sherman Act.

For these reasons, the exemption should lapse when the agreement expires, provided the employees through their bargaining representative have made it clear that they no longer want the challenged restraint maintained.

Even if the exemption were deemed to survive the expiration of a bargaining agreement, in no event could the exemption properly extend beyond impasse in negotiations over a successor contract. Once impasse has been reached, employers are no longer required to maintain the status quo. *See Bonanno Linen*, 454 U.S. at 415-16 n.9. They fall back on their common law rights, the exercise of which is ordinarily subject to antitrust scrutiny. Competitive restraints subsequently enforced by the employers

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[31] *See NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224-25 (1949); Note, *Releasing Superstars From Peonage*, 104 Harv. L. Rev. at 892-93.

are not the product of bona fide collective bargaining and do not have the consent of the employees. The Eighth Circuit's contrary holding in *Powell v. NFL* demonstrates the baleful consequences of an indefinite rule of post-impasse immunity, which differs little in substance from the rules adopted by the D.C. Circuit in this case and the Second Circuit in *Williams*. The football players acted to decertify the Players Association within days of the *Powell* decision, thus starkly disproving the Eighth Circuit's unsupported presumption that the "Right of First Refusal/Compensation" system challenged in that case was "clothed with union approval," 930 F.2d at 1302 (internal quotation marks omitted).

Accordingly, the exemption must terminate at the very latest upon impasse. In the present case, regardless of whether the exemption ends at impasse or upon expiration of a bargaining agreement, it can provide no immunity for respondents' unilateral imposition of their salary-fixing scheme.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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January 19, 1996

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No. 95-388

In The

Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,

Petitioners,

v.

PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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February 1996

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QUESTION PRESENTED

Whether members of a multiemployer bargaining unit are subject to antitrust liability to their unionized employees for jointly utilizing, during the collective bargaining process, economic weapons authorized by the federal labor laws that affect terms and conditions of employment but do not adversely affect competition in any product market.

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

The parties to the proceeding are listed at Pet. Br. ii-iii. The only corporate respondents with a parent company are Houston Oilers, Inc. (KSA Industries, Inc.) and Pro-Football, Inc. (Jack Kent Cooke, Incorporated). The only corporate respondents with a non-wholly owned subsidiary are Indianapolis Colts, Inc. (Colt Center Company) and Minnesota Vikings Football Club, Inc. (Minnesota Vikings Ventures, Inc.).

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Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) 34
McNeil v. NFL, Civ. No. 4-90-476 (D. Minn.) 30
Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944) 17
Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985) 29, 42
Mid-America Regional Bargaining Association v. Will County Carpenters District Council, 675 F.2d 881 (7th Cir.), *cert. denied*, 459 U.S. 860 (1982) 28
Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 29
National Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3070 (July 24, 1995) (No. 95-137) . . . . . *passim*

NCAA v. Board of Regents, 468 U.S. 85 (1984) . . . 6, 46
NFL Management Council, 203 N.L.R.B. 958 (1973), *remanded*, *National Football League Players Association v. NLRB*, 503 F.2d 12 (8th Cir. 1974) 47
NFL Management Council, 309 N.L.R.B. 78 (1992) . . 47
NFL v. North Am. Soccer League, 459 U.S. 1074 (1982) 46
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New York Life Insurance Co. v. Deer Lodge County, 231 U.S. 495 (1913) 21
Newspaper Drivers & Handlers' Local No. 372 v. NLRB, 404 F.2d 1159 (6th Cir. 1968), *cert. denied*, 395 U.S. 923 (1969) 34
North America Soccer League v. NLRB, 613 F.2d 1379 (5th Cir.), *cert. denied*, 449 U.S. 899 (1980) 46, 47
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Powell v. NFL, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991) 7, 34, 45, 48
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Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840 (3d Cir. 1974) 28
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S. Rep. No. 698, 63rd Cong., 2d Sess. 46 (1914) 22
51 Cong. Rec. 13,980 (1914) 22
51 Cong. Rec. 14,019 (1914) 22
Robert Bork, *The Antitrust Paradox* (1978) 46

Robert A. Gorman, *Basic Text on Labor Law, Unionization, and Collective Bargaining* (1976) 11, 13
Louis B. Boudin, The Sherman Act and Labor Disputes: II, 40 Colum. L. Rev. 15 (1940) 20
Archibald Cox, Labor and the Antitrust Laws A Preliminary Analysis, 104 U. Pa. L. Rev. 252 (1955) 23, 25
Michael S. Jacobs & Ralph K. Winter, Jr., Antitrust Principles and Collective Bargaining By Athletes: Of Superstars in Peonage, 81 Yale L.J. 1 (1971) 12, 24, 28
Milton Handler, Reforming The Antitrust Laws, 82 Colum. L. Rev. 1287 (1982) 24, 25
Douglas L. Leslie, Principles of Labor Antitrust, 66 Va. L. Rev. 1183 (1980) 24
Gary R. Roberts, Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints, 75 Geo. L.J. 19 (1986) 24
Theodore J. St. Antoine, Connell: Antitrust Law at the Expense of Labor Law, 62 Va. L. Rev. 603 (1976) 24
Don Pierson, *Deep Redskins Pay The Price*, Chi. Trib., Jan. 21, 1992 3

In The

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-388

ANTONY BROWN, *et al.*,

Petitioners,

v.

PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 50 F.3d 1041. The opinions of the district court addressing the nonstatutory labor exemption (Pet. App. 64a-90a) and the scope of the antitrust laws (Pet. App. 93a-114a) are reported at 782 F. Supp. 125 and 1992-1 Trade Cas. (CCH) ¶ 69,747, respectively.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1995. A petition for rehearing and rehearing en banc was denied on June 12, 1995. Pet. App. 61a-63a. The petition for a writ of certiorari was filed on September 11,

1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In addition to the provisions reprinted in petitioners' brief (Pet. Br. 3-4), Section 6 of the Clayton Act, 15 U.S.C. § 17, Section 20 of the Clayton Act, 29 U.S.C. § 52, Sections 8(d) and 9(a) of the National Labor Relations Act, 29 U.S.C. §§ 152(1) and (2), 158(d), 159(a), and Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, are reprinted at App., *infra* 1a-3a.

STATEMENT OF THE CASE

This is a labor dispute. Respondents, member clubs of the National Football League (NFL), are members of a multi-employer bargaining unit. Petitioners, player-employees of the NFL clubs, are members of the National Football League Players Association (NFLPA), the union certified as the exclusive bargaining representative of all NFL players. The subject of the dispute — salaries — is a mandatory subject of collective bargaining under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq*. The challenged conduct was undertaken by the NFL as part of the collective bargaining process. The employees assert antitrust claims arising from a diminution of competition solely in the unionized labor market; the parties agree that the challenged conduct had no adverse impact on competition in any product market.

A. Statement of Facts

The NFL is a joint venture of interdependent member clubs that collectively produce a common entertainment product: NFL football, a series of athletic competitions that ultimately yield a Super Bowl champion. To produce their joint product, NFL clubs must collectively establish and maintain many common terms and conditions of employment for their player-employees. For example, NFL players must

agree to play the same number of regular season games and to abide by the League's established playing rules. Pet. App. 108a; J.A. 110-15.

The NFL's common rules are designed to enhance the quality of its entertainment product so that the League may compete effectively with other entertainment providers. Close and uncertain outcomes — for both individual games and for championships over the course of a season or seasons — are necessary to achieve this goal. J.A. 111-15. To promote such outcomes, NFL rules seek to ensure that no club secures an unfair or sustained advantage on the playing field. Rules adopted for this purpose include employment terms that disperse player talent among member clubs (such as the college draft) and "roster rules" that limit the number of players that a club may call upon in games or in practice. J.A. 114-15; Pet. App. 108a-09a.

The NFL's roster rules address the status of players who, because of injury, are unable to play in games. Such "Injured Reserve" players do not count toward their clubs' roster limits. During the 1980s, some clubs began to "stash" promising young players on Injured Reserve. In stashing, a club would report as "injured" healthy players for whom it did not have an immediate need, retain such players on its roster, develop their talent in practice and, without displacing any of its active-roster players, thereby secure a competitive playing field advantage.[1] Stashing prevented other clubs from

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[1] *See generally, e.g.*, Don Pierson, *Deep Redskins Pay The Price*, Chi. Trib., Jan. 21, 1992, at C1 ("[T]he Redskins are notorious for stretching the injured reserve system to its limits. Quarterback Mark Rypien spent two years on injured reserve before stepping up. Backup quarterback Stan Humphries spent his rookie season on the 'non-football illness' reserve list with a mysterious blood ailment. Young quarterback Cary Conklin also spent his 1990 rookie season on injured reserve.").

utilizing such promising players to improve their own active rosters. J.A. 100-01, 104-06.

To address this threat to the integrity and quality of the League's entertainment product, in March 1989 the League revised its roster rules to reduce clubs' incentives to stash players on Injured Reserve. J.A. 100-01, 104, 106-07. The same resolution (called "G-2") authorized each club to create a "Developmental Squad" — a unit of up to six rookie or first-year players who, as free agents, had been unable to earn a position with any club. J.A. 107-08. Developmental Squad members were to practice with their club's regular-roster players but could not play in games. *See generally* J.A. 100-09.

To preclude abuses of Developmental Squads similar to those that had plagued Injured Reserve, Resolution G-2 proposed that practice players be paid a uniform salary in an amount to be negotiated with the NFLPA. The uniform salary provision was intended to reduce the likelihood that quality players would agree to be stashed on Developmental Squads, where they would be inaccessible to other clubs needing their services in games and hence unavailable to improve the League's entertainment product. J.A. 102-03, 107.

In April 1989, the NFL initiated negotiations with the NFLPA over the terms and conditions of employment for Developmental Squad members. J.A. 101.[2] These negotiations continued for nearly four months. *See* J.A. 11-24, 101-02; Pet. App. 65a-67a. The NFLPA refused to agree to any uniform wage — at $1,000 per week, as the League had proposed, or at any other level. Faced with a clear impasse (Pet. App. 81a), the NFL implemented its proposal.

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[2] At all times relevant to the events at issue, the NFLPA was certified by the NLRB as the exclusive collective bargaining representative of all NFL players. J.A. 58-59.

Petitioners never challenged the district court's well-documented finding that "the parties did bargain at arm's length and in good faith to impasse." *Id.* Nor did their union exercise any collective bargaining weapons or mount any labor-law challenge to the League's action.

During the 1989 season, 236 Developmental Squad members were each paid $1,000 per week for their practice services, a restraint of the labor market that the district court characterized as neither "pernicious" nor "manifestly anticompetitive." Pet. App. 109a. Petitioners have explicitly acknowledged that this restraint had no adverse effect on competition in any product market. *Id.* at 29a & n.8.[3]

B. The Proceedings Below

"Plaintiffs, through the NFLPA, filed the present suit on May 9, 1990." Pet. App. 95a. In June 1991, after a class had been certified, the district court (Lamberth, J.) granted plaintiffs' motion for partial summary judgment on the non-statutory labor exemption defense. The district court rejected the NFL's argument that the challenged conduct was protected by the exemption, which it held (1) had ended upon expiration of the previous collective bargaining agreement in 1987, or (2) had ended at impasse, or (3) did not apply because the challenged restraint had not been embodied in a collective bargaining agreement. Pet. App. 72a-90a. The district court later ruled that the challenged restraint on the labor market

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[3] Petitioners' assertion that the NFL discontinued the uniform salary term after it was challenged is misleading. Pet. Br. 12 n.7. For subsequent seasons, the parties bargained, and the district court approved, litigation settlements that prescribed team-wide maximums for practice player salaries, Pet. App. 100a n.6, and such terms were then addressed in the NFL's current collective bargaining agreement. The NFL's unilateral implementation of the uniform salary term — which was in place for only one season — was plainly among the factors leading to a bargained resolution of this issue for subsequent seasons.

was within the scope of the antitrust laws, Pet. App. 101a-04a, and ultimately enjoined the NFL from establishing "a uniform regular-season salary for any category of players whom [they] may at any time employ," J.A. 133-34.[4]

The court of appeals reversed. Pet. App. 1a-60a. Chief Judge Edwards' opinion for the court recognized that in implementing a bargaining proposal that had been negotiated in good faith to impasse, the NFL had used an authorized economic weapon available to employers in the collective bargaining process. The court observed that this Court's precedents have "made it clear that an employer's right to 'institute unilaterally the working conditions which he desires' is among the lawful 'tools of economic self-help' available to be utilized as a tactic in collective bargaining." *Id.* at 23a (quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965)). The court therefore concluded that the NFL had been held liable under the antitrust laws for doing "exactly what federal labor policy condones." Pet. App. 5a.

For that reason, and because the uniform salary term had no adverse impact on the output market for the League's entertainment product, Pet. App. 29a & n.8, the court held that the NFL is "exempt from Sherman Act liability in this case." *Id.* at 32a. It determined (*id.* at 4a-5a) that

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[4] The district court held on summary judgment that implementaion of the uniform salary term violated Section 1 of the Sherman Act. The court recognized the NFL's evidence demonstrating that, by reducing stashing and enhancing the NFL's entertainment product, the uniform salary term yielded pro-competitive benefits; it nonetheless deemed that evidence "irrelevant" under the rule of reason, erroneously relying on a decision, *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978), that had been effectively overruled by *NCAA v. Board of Regents*, 468 U.S. 85, 119-20 (1984). Pet. App. 110a-114a. The damages issue was then tried to a jury, resulting in a judgment of more than $30 million. J.A. 125-32.

> restraints on competition lawfully imposed through the collective bargaining process are exempted from antitrust liability so long as such restraints primarily affect only the labor market organized around the collective bargaining relationship.

The court explained that "the inception of a collective bargaining relationship between employees and employers irrevocably alters the governing legal regime. . . . [O]nce collective bargaining begins, the Sherman Act paradigm of a perfectly competitive market necessarily is replaced by the NLRA paradigm of organized negotiation — a paradigm that itself contemplates collusive activity on the parts of both employees and employers." Pet. App. 24a-25a.

The court squarely rejected petitioners' suggestion that "routine practices of multi-employer bargaining," including the use of authorized economic weapons like the one at issue here, violate the antitrust laws:

> [T]here is no doubt whatsoever that [a] single employer lawfully could have taken unilateral action to impose a fixed salary for practice team players after bargaining in good faith to a point of impasse. Indeed, the players do not assert otherwise, for they recognize that this is standard fare in labor law. And nothing in the antitrust law is intended to proscribe such unilateral action by a single employer. So the heart of the Players' position appears to be that the presence of a multi-employer bargaining unit should make a difference under the antitrust law. This is a wholly untenable position . . . .

Pet App. 25a; *see also id.* at 25a-28a (discussing precedents and legislative history).

The D.C. Circuit's holding endorsed decisions of the Eighth Circuit and the Second Circuit that had reached the same conclusion. Pet. App. 21a-22a, 25a-28a (citing *Powell*

v. NFL, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), and *National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3070 (July 24, 1995) (No. 95-137)).

Judge Wald dissented. Pet. App. 34a-60a. She joined the majority in recognizing that the nonstatutory labor exemption embraces "multiemployer 'bargaining tactics'" to which the union has not agreed, including actions by members of a multiemployer bargaining unit to lock out their employees. *Id.* at 53a n.7. She nonetheless proposed to exclude from the scope of the nonstatutory exemption only the tactic at issue here: the unilateral implementation of terms bargained in good faith to impasse. *Id.* at 59a. In any event, she would have reversed on the ground that the district court had erred in granting summary judgment under the rule of reason, *id.* at 36a n.3, an issue not reached by the majority, *id.* at 9a.

SUMMARY OF ARGUMENT

Congress has created a comprehensive system of collective bargaining as the *exclusive* means of determining terms and conditions of employment in unionized industries. That system, which affords employees and employers a balanced array of economic weapons, has as its cornerstone the complete exclusion of the government, including antitrust courts, from any substantive role in the bargaining process. Petitioners, who have received all of its benefits, now seek to undermine that system by invoking the radically different (and inconsistent) regime of the antitrust laws, which generally condemn collective behavior and require the courts to review the substantive reasonableness of the parties' conduct.

Petitioners' position, if accepted, would fundamentally alter and undermine multiemployer bargaining, a common practice that has been repeatedly encouraged and approved by Congress, this Court, the NLRB, and organized labor. Given the long history of such bargaining, it is noteworthy that no

court of appeals has ever accepted petitioners' position that the routine practices of multiemployer bargaining — practices fully authorized by the labor laws — are subject to antitrust review. The reasons are clear.

First, Congress has provided that terms and conditions of employment in unionized industries are to be determined exclusively by the collective bargaining process overseen by the NLRB, and not by antitrust courts. Indeed, as this Court has previously recognized, the antitrust laws simply do not apply to pure labor-market restraints — those that do not adversely affect competition in any product market. In any event, the principal function of the antitrust weapon that petitioners and their union seek to wield is not the establishment of a truly competitive market (the goal of the antitrust laws), but rather increased power in collective bargaining.

Second, even if otherwise within the scope of the Sherman Act, actions lawfully taken by employers in the course of the collective bargaining process that do not adversely affect competition in a product market are protected by the nonstatutory labor exemption. This exemption, as applied by the courts of appeals, is both necessary to preserve the labor law regime (which, as the government concedes, is of equal standing with the antitrust laws) and narrowly tailored to protect the collective bargaining process without affecting the core purposes of the antitrust laws.

The varying proposals of petitioners and their amici to limit the scope of the exemption lack any principled basis in the labor laws, the antitrust laws, or even common sense. Their suggestions are fundamentally inconsistent with crucial elements of the labor-law regime and would be so disruptive of the collective bargaining process as to make multiemployer bargaining unworkable.

Ultimately, the question here is whether, when employers' conduct limits competition *only* in a unionized labor market

and that conduct is fully authorized by the labor laws, the antitrust laws may properly be exploited as a weapon in collective bargaining. The courts of appeals have consistently rejected this proposition, and this Court should do so as well.

ARGUMENT

Petitioners and their amici contend that antitrust courts should be available to shape, if not to prescribe, terms and conditions of employment in unionized industries. No decision of this Court — and no decision of any court of appeals — supports such a notion.

That should not be a surprise. The labor laws rest on the fundamental premise that terms and conditions of employment in unionized industries are to be determined by the *process of collective bargaining, and that the government is excluded from that process*, except to the extent necessary to ensure compliance with the parties' obligation to negotiate in good faith. And there is ample authority, in both statutes and decisions of this Court, making clear that the antitrust laws do not apply to conduct that limits competition *only* in a labor market.

Something is fundamentally wrong with the contention that antitrust courts have a role to play in the collective bargaining process. As Judge Winter recently observed:

> [W]e find during the 104 succeeding years [since passage of the Sherman Act] not a single instance, prior to this very case, of a union or an individual employee asserting the stark claim that the routine practices of multiemployer bargaining violate the antitrust laws.

National Basketball Ass'n v. Williams, 45 F.3d 684, 689 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3070 (July 24, 1995) (No. 95-137). Even petitioners acknowledge that, aside from a few cases in the professional sports industry (where such efforts have been consistently rejected by the

courts of appeals), the antitrust laws have never been used as a collective bargaining weapon. Pet. Br. 39. And it is equally telling that petitioners, their amici, and the dissent below cannot agree on when during the collective bargaining process the antitrust weapon may be deployed or to what conduct it should be applied.[5]

Whether petitioners' contention is rejected on the basis that no conflict is presented between the antitrust and labor laws, as the Second Circuit held in *Williams*, or by an accommodation of the antitrust laws and the labor laws, as the D.C. Circuit held below, the required result is clear: Conduct undertaken as part of the collective bargaining process that limits competition only in a unionized labor market is not subject to antitrust review.

I. TERMS OF EMPLOYMENT IN UNIONIZED LABOR MARKETS ARE TO BE DETERMINED EXCLUSIVELY BY THE COLLECTIVE BARGAINING PROCESS.

A. The NLRA Establishes A Comprehensive Process, Intended To Be Free Of Governmental Interference, To Determine The Terms Of Employment In Unionized Labor Markets.

The National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (1988), prescribes the framework for collective bargaining. *See Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 616 (1986); Robert A. Gorman, *Basic Text on Labor Law, Unionization, and Collective Bargaining* 5-6 (1976). The NLRA seeks to ensure that terms and conditions of

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[5] There appears to be disagreement even within the government. The government's brief reflects the views of the Department of Justice and the Federal Trade Commission, but it was not filed on behalf of the NLRB. *See* U.S. Br. 27 n.10 (simply indicating the NLRB's disagreement with the result below).

employment (including wages) are resolved at the bargaining table, not in the courtroom. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103-04, 108-09 (1970).

The NLRA expresses Congress' intent to "encourag[e] the practice and procedure of collective bargaining." 29 U.S.C. § 151. That practice and procedure is a carefully developed and balanced bilateral process.[6] Employees have the right to combine for collective bargaining purposes. *See* 29 U.S.C. § 157. Employers have the same right; they may band together in a multiemployer unit, which functions "as a single entity in bargaining with a union or unions." *Williams*, 45 F.3d at 688.

Multiemployer bargaining is a widespread practice, involving millions of employees and thousands of employers, that antedates not only the NLRA, but also the Sherman Act. *Williams*, 45 F.3d at 688-89; *see also Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 410 n.4 (1982). The NLRA makes no distinction between the rights and obligations of employers who participate individually in the collective bargaining process and those who participate as part of a multiemployer unit. *See* 29 U.S.C. § 152(1) & (2) (defining "employer" to include "any person acting as an agent of an employer" and defining "person" to include "associations").

This Court has recognized that multiemployer bargaining is "a vital factor in the effectuation of the national labor policy of promoting labor peace through collective bargaining." *NLRB v. Truck Drivers Local Union No. 449* ("*Buffalo*

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[6] The NLRA "seeks to order labor markets through a system of countervailing power. Thus it is often referred to by economists as a bilateral monopoly." Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining By Athletes: Of Superstars in Peonage*, 81 Yale L.J. 1, 22 (1971) (footnotes omitted).

Linen"), 353 U.S. 87, 95 (1957). Thus, for example, in *Buffalo Linen*, the Court unanimously upheld the legality of a joint lockout by members of a multiemployer unit. *Id.* at 97; *see also NLRB v. Brown*, 380 U.S. 278, 284, 292 (1965) (upholding lockout and hiring of replacement workers by multiemployer bargaining unit); *Bonanno Linen*, 454 U.S. at 419 (preserving stability of multiemployer units is a "proper and pre-eminent goal" of labor law).

In *Bonanno Linen*, the Court explained that multiemployer bargaining benefits employees as well as employers. 454 U.S. at 409-10 & n.3. It makes available to employees pensions, health insurance, and other benefits that could not be obtained from a single employer whose employees are too few or too transient to support such programs. For employers, it offers protection against whipsaw tactics and eliminates "'the competitive disadvantages resulting from non-uniform contractual terms'" for labor. *Id.* (quoting *Buffalo Linen*, 353 U.S. at 96).[7]

The labor laws regulate the collective bargaining process before, during, and after the parties reach substantive agreement. *See generally* Gorman, *supra*, at 399-539. A "mutual obligation" is imposed on both sides "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment," the "mandatory subjects of bargaining." 29 U.S.C. § 158(d). Each side has access to a "'soup-to-nuts array' of rules, tribunals and remedies" in the event that the other fails to bargain in good faith or otherwise to comply with its procedural obligations. *Caldwell v. American Basketball Ass'n,*

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[7] The Court's explicit reference, in both *Buffalo Linen* and *Bonanno Linen*, to the elimination of competitive differences confirms the basic labor law principle that terms and conditions of employment in unionized industries are to be determined by the process of collective bargaining, not by operation of a competitive labor market.

Inc., 66 F.3d 523, 529 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3439 (Dec. 20, 1995) (No. 95-1012).

The bargaining process affords each side "economic pressure devices . . . to make the other party incline to agree" to its proposed terms. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 489 (1960). For example, the union has the right to strike; the employers have the right to lock out. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 309-11 (1965). The employers' authorized economic weapons include the conduct challenged by petitioners here: the right unilaterally to implement changes in terms and conditions of employment negotiated in good faith to impasse with the union. *Id.* at 316; see pp. 37-43, below. "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel" of the collective bargaining process established by Congress through the labor laws. *Insurance Agents*, 361 U.S. at 489.

This carefully balanced process reflects Congress' "belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole." *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 678 (1981). Except to ensure that the parties comply with their duty to bargain in good faith, "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by *any* governmental power to regulate the substantive solution of their differences." *Insurance Agents*, 361 U.S. at 488 (emphasis added). The government's role is only to "oversee and referee *the process* of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." *H.K. Porter Co.*, 397 U.S. at 108 (emphasis added).

The strong policy against judicial intervention in the collective bargaining process, including multiemployer bargaining, is reflected not only in a consistent line of this

Court's decisions addressing the NLRA, but also in an array of other statutory provisions. *E.g.*, 29 U.S.C. § 104 (Norris-LaGuardia Act bar on injunctions in certain cases "involving or growing out of any labor dispute"); 29 U.S.C. § 52 (Clayton Act bar on injunctions in "any case between an employer and employees . . . involving, or growing out of, a dispute concerning terms or conditions of employment"). Thus, for example, "[w]hile the Norris-LaGuardia Act's bar [against] federal-court labor injunctions is not explicitly phrased as an exemption from the antitrust laws, it has been interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes." *H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 714 (1981).

As we demonstrate more fully at pages 29-31 below, if petitioners succeed in their effort to secure a role for antitrust courts in shaping the terms and conditions of employment in unionized industries, they will have undermined and fundamentally altered the collective bargaining process by shifting resolution of labor disputes from the bargaining table to the courts. Such a result would be at odds with established labor-law jurisprudence and with congressional intent, which sought "to foreclose judges and juries from roaming at large in the area of collective bargaining, under cover of the antitrust laws." *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 716 (1965) (Goldberg, J.).

B. The Labor Laws, Not The Antitrust Laws, Are The Source Of The Competition Interest Asserted By Petitioners.

Notwithstanding their membership in a union certified as their exclusive bargaining representative, their participation in a broad spectrum of collectively bargained benefits, and their access to an array of economic weapons afforded their union

under the labor laws, petitioners nonetheless assume that each of them had a right *under the antitrust laws* to negotiate individually his salary as a practice player.

That proposition cannot be reconciled with basic labor-law tenets. It is well established that when employees combine for collective bargaining purposes, they "extinguish[] the individual employee's power to order his own relations with his employer." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *see also* 29 U.S.C. § 159(a) (the union "shall be the exclusive representative[] of all the employees in such unit for the purposes of collective bargaining in respect to the rates of pay"); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944) (collective bargaining's purpose is to "supersede the terms of separate agreements of employees"); *Caldwell*, 66 F.3d at 528 (in a collective bargaining relationship, "the employee loses the right to bargain for the best price for his or her labor").[8]

That is not to say that the union cannot secure for its members, *through the collective bargaining process*, the right to negotiate individually over certain terms of employment. *J.I. Case*, 321 U.S. at 338. But to the extent that it exists in a unionized industry, "individual bargaining is not an exercise of a right to free competition under the antitrust laws; rather, it is an exercise of a right derived from collective bargaining itself." *Caldwell*, 66 F.3d at 528.

In a unionized industry, individual bargaining of terms and conditions of employment may not occur unless both the union and the employers consent. Without union consent, the

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[8] More generally, a competitive market of the kind ordinarily sought by the antitrust laws is displaced by "the association of employees to eliminate competition over wages and working conditions." *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975).

employers commit an unfair labor practice if they attempt to bargain with an individual employee. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-84 (1944). Similarly, the union cannot avoid its own duty to bargain *collectively* over mandatory subjects, including wages, 29 U.S.C. §§ 158(d), 159(a), unless it secures the employers' consent through collective bargaining.

Here, through the collective bargaining process, the parties' representatives *created* the "right" asserted by petitioners to negotiate individually certain salary terms. J.A. 59 (expired CBA "authorized individual salary negotiations"); Pet. App. 88a (same); *id.* at 36a n.2 (players "sought to achieve employer competition through the . . . collective bargaining process") (Wald, J., dissenting). *See generally Allis-Chalmers Mfg. Co.*, 388 U.S. at 180 ("Congress has seen fit to clothe the bargaining representatives with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . ." (quotation omitted)). Put differently, the competition interest asserted by petitioners finds its source not in the antitrust laws but rather in the labor laws; its source is (1) the consent of the union, itself a creature of the NLRA, and (2) the consent of management, secured by the union through the collective bargaining process established by the NLRA.

In other industries, in which neither unions nor multiemployer units have consented to individual negotiations for unionized employees, an *antitrust* challenge to a unilaterally implemented wage scale would have been almost unthinkable prior to the district court's decision below. *See Caldwell*, 66 F.3d at 530 ("There is no precedent outside sports for ever initiating this genre of litigation."); *accord* Pet. Br. 39. The reason is clear. In those industries, no "competition" interest of the kind asserted by petitioners exists because *none has been created through the process established by the labor laws*. And no *antitrust* right exists for such

employees because the decision to unionize "extinguishes the individual employee's power to order his own relations with his employer." *Allis-Chalmers Mfg. Co*, 388 U.S. at 180.

The labor laws not only provide the source for the competition interest that petitioners assert here; they also provide means to *protect* such an interest. Statutory remedies, including cease and desist orders, are available if employers breach a contractual commitment to allow individual negotiations or if employers attempt to withdraw such opportunities prematurely or in bad faith during the collective bargaining process. As demonstrated in the professional sports industry, collectively bargained remedies may also be available.[9]

Thus, it should not be surprising that every court of appeals to address this issue has held that employees must look to the labor laws — not to the antitrust laws — to protect any competition interest of the kind asserted by petitioners here.

II. THE SHERMAN ACT DOES NOT REACH LIMITATIONS ON COMPETITION IN A LABOR MARKET THAT DO NOT ADVERSELY AFFECT COMPETITION IN A PRODUCT MARKET.

Petitioners and their amici assert that joint action by employers that restrains *only* a labor market is subject to the antitrust laws unless it falls within an implied exemption. *See* Pet. Br. 24-25; U.S. Br. 10. They are wrong, and not only for the reasons set forth above. Their argument also ignores

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[9] For example, the NFL now operates under collectively bargained anti-collusion provisions that prohibit agreements among the NFL clubs that restrict or limit individual club decision-making in numerous areas, including wages, authorize enforcement of that proscription in evidentiary proceedings before a Special Master, and provide for extensive remedies, including treble damages.

both (1) this Court's decision in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), which held that the Sherman Act prohibits only restraints affecting "commercial competition in the marketing of goods or services," *id.* at 495, and (2) the plain language of Section 6 of the Clayton Act, which declares that "[t]he labor of a human being is not an article of commerce," 15 U.S.C. § 17. *See generally Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 636 (1975) (the Court has reconciled the antitrust and labor laws "not only by delineating exemptions from antitrust coverage but also by adjusting the scope of the antitrust remedies themselves").

A. The Sherman Act Applies Only To Restraints On Competition In A Market For Goods Or Services.

This Court has long interpreted the broad language of Section 1 of the Sherman Act in the light of "the particular evils at which the legislation was aimed." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940); *see Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911) (Sherman Act prohibits only agreements that are "unreasonably restrictive of competitive conditions"). In *Apex Hosiery*, the Court held that agreements limiting competition only in a labor market are not within the scope of the Sherman Act. "[S]ome form of restraint of commercial competition," the Court declared, is "the *sine qua non* to the condemnation of contracts, combinations or conspiracies under the Sherman Act." 310 U.S. at 500.

Apex Hosiery was an antitrust challenge to a sit-down strike. In holding that the challenged conduct was outside the scope of the Sherman Act, the Court concluded, based on its review of the history and purpose of the Act, that

> [t]he end sought [by Congress] was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise

> prices or otherwise control the market to the detriment of purchasers or consumers of goods and services.

Id. at 493. After observing that the term "restraint of trade" "had a well-understood meaning at common law," *id.* at 494-95, and that the Sherman Act was aimed at restraints "comparable to restraints deemed illegal at common law," *id.* at 498, the Court concluded that a restraint on a labor market "was not considered an illegal restraint of trade at common law when the Sherman Act was adopted," *id.* at 502.[10] Accordingly, it held that absent "an effect upon prices in the market or [an effect that] otherwise . . . deprive[s] purchasers or consumers of the advantages which they derive from free competition," *id.* at 501, labor market restraints "are not within the Sherman Act." *Id.* at 512.

Although the defendants in *Apex Hosiery* were a labor union and its officers, the Court confirmed that the Sherman Act should be applied impartially to "the activities of industry and labor alike." *Id.* at 512. The Court made clear that it was not defendants' status as employees that placed their activities outside the reach of the Sherman Act. *Id.* at 488-89. The determinative fact was that the challenged restraint did not affect competition in the marketing of goods or services, and thus "*the effect* of the combination or conspiracy" was not a "restraint of trade within the meaning of the Sherman Act."

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[10] Agreements among employers over wages — like agreements among employees — were enforceable at common law. *See The Master Stevedores' Ass'n v. Walsh*, 2 Daly 1, 13 (N.Y. Ct. of Common Pleas 1867) ("it is lawful for any number of journeymen or of master workmen to agree, on the one part that they will not work below certain rates, or on the other that they will not pay above certain prices"); Louis B. Boudin, *The Sherman Act and Labor Disputes: II*, 40 Colum. L. Rev. 15, 42-47 (1940) (common law did not prohibit agreements among employers or employees over wages that did not affect competition in the employers' output market).

Id. at 501 (emphasis added). Indeed, the Court found it "significant" that it had

> never applied the Sherman Act in any case, *whether or not involving labor organizations or activities*, unless the Court was of the opinion that there was some form of restraint upon commercial competition in the marketing of goods or services.

Id. at 495 (emphasis added). For more than fifty years, this Court has never varied from that principle. It should not do so here.

B. Section 6 Of The Clayton Act Precludes Application Of The Sherman Act To Conduct That Limits Competition Only In A Labor Market.

Although the Court's decision in *Apex Hosiery* rested primarily on its interpretation of the Sherman Act, the Court also relied on Section 6 of the Clayton Act, *see* 310 U.S. at 502-03, which provides that "[t]he labor of a human being is not a commodity or article of commerce." 15 U.S.C. § 17. The plain meaning of this provision is that the antitrust laws do not apply to restraints that limit competition only in a market for labor.

This plain meaning is confirmed by the legal background against which Congress enacted the Clayton Act in 1914. In that era, various activities were understood not to be "commerce," and were therefore outside the scope of the antitrust laws. *See, e.g., New York Life Ins. Co. v. Deer Lodge County*, 231 U.S. 495, 503-04, 510 (1913) ("contracts of insurance are not commerce at all, neither state nor interstate"). The language of Section 6 thus was precisely suited

to carving out from the antitrust laws restraints that adversely affect only the labor market.[11]

The government asserts that the legislative history of Section 6 "gives no indication that Congress intended to immunize *employers'* unilateral (*i.e.*, not negotiated with a union) combinations in restraint of labor markets." U.S. Br. 12 n.4. The government's analysis is backwards: the Court does "not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 114 S. Ct. 655, 662 (1994). In any event, the legislative history of Section 6 confirms that "labor is not, and ought not to be regarded as, a commodity, within the purview of the antitrust laws." S. Rep. No. 698, 63rd Cong., 2d Sess. 46 (1914).[12] Giving effect to the plain language of Section 6 is fully consistent with the purpose of the statute, which "'was designed to *equalize* before the law the position of workingmen and employer as industrial combatants.'" *United States v. Hutcheson*, 312 U.S. 219, 229 (1941) (quoting *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 484 (1921) (Brandeis, J., dissenting)) (emphasis added).

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[11] The Court subsequently held that insurance is within the scope of the commerce power, *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944); Congress responded by enacting the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq*. The constitutional issue did not arise with respect to labor because *Congress* provided that labor is not an article of commerce. 15 U.S.C. § 17.

[12] *See also, e.g.*, 51 Cong. Rec. 14,019 (1914) (statement of Senator Jones) ("[Labor] is no part of commerce. It is not a commodity at all."); *id.* 13,980 (statement of Senator Cummins) ("Labor is not a commodity; it is not an article of commerce . . . .").

C. This Court Has Consistently Adhered To The Distinction Between Restraints Of Labor Markets And Restraints Of Product Markets.

In the half century since *Apex Hosiery*, this Court has never wavered from the distinction between labor-market effects and product-market effects of challenged restraints. In *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, 806, 809 (1945), the Court, relying on *Apex Hosiery*, reaffirmed that the Sherman Act was intended "to protect consumers" and "to preserve business competition." And in *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945), decided the same day as *Allen Bradley*, the Court held that the Sherman Act is not implicated by a suit between a union and an employer that "involves nothing more than a dispute over employment."

Thirty years later, in *Connell Construction*, the Court concluded that certain union activity violated the Sherman Act because it had impermissible effects on a "business market . . . that would not follow naturally from the elimination of competition over wages and working conditions." 421 U.S. at 625. In *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 530, 540 (1983), the Court again affirmed that the Sherman Act was intended to protect consumers in product markets, and held that the union did not suffer antitrust injury because its "labor-market interests seem to predominate."[13]

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[13] The *Apex* distinction has been followed by lower courts and approved by leading commentators. *See, e.g., Amalgamated Meat Cutters v. Wetterau Foods, Inc.*, 597 F.2d 133, 135 (8th Cir. 1979); *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers*, 431 F.2d 1004, 1006-07 (5th Cir. 1970), *cert. dismissed*, 404 U.S. 801 (1971); *Kennedy v. Long Island R.R. Co.*, 319 F.2d 366, 372-73 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963); *Plumbers & Steamfitters Local 598 v. Morris*, 511 F. Supp. 1298, 1306 (E.D. Wash. 1981); Archibald Cox, *Labor and the Antitrust Laws — A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 254-56 (1955);

Petitioners and the government cite *Anderson v. Shipowners' Ass'n*, 272 U.S. 359 (1926), and *Radovich v. NFL*, 352 U.S. 445 (1957), in support of their assertion that the antitrust laws apply to restraints on a labor market without regard to any product market effect. Pet. Br. 24-25; U.S. Br. 10. Neither case stands for that proposition. *Anderson* was decided prior to *Apex Hosiery*, and therefore was encompassed by the Court's subsequent statement that it "has never applied the Sherman Act in any case . . . unless the Court was of the opinion that there was some form of restraint upon commercial competition in the marketing of goods or services." *Apex Hosiery*, 310 U.S. at 495.[14]

Moreover, the Court in *Anderson* deemed irrelevant the defendants' assertion that "the *object* of the combination was merely to regulate the employment of men and not to restrain commerce. A restraint of interstate commerce cannot be justified by the fact that the object . . . might have been unobjectionable in the absence of such restraint." 272 U.S. at 363 (emphasis added). If the Court had intended to hold that

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Milton Handler, *Reforming The Antitrust Laws*, 82 Colum. L. Rev. 1287, 1341, 1347-48 (1982); Michael S. Jacobs & Ralph K. Winter, Jr., *supra*, 81 Yale L.J. at 26; Douglas L. Leslie, *Principles of Labor Antitrust*, 66 Va. L. Rev. 1183, 1195-99 (1980); Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 Geo. L.J. 19, 34-58 (1986); Theodore J. St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 Va. L. Rev. 603, 606 (1976). We recognize, of course, that some lower courts and commentators read *Apex Hosiery* and Section 6 more restrictively. *See, e.g.*, Pet. App. 37a-38a (Wald, J., dissenting) (citing cases and commentators).

[14] Justice Stone, who authored the Court's opinion in *Apex Hosiery*, was a member of the Court when *Anderson* was decided, although he did not take part in the decision of that case. The dissenters in *Apex Hosiery* (including Justice McReynolds, who participated in *Anderson*) did not disagree with Justice Stone's statement.

regulation of employment, without more, was within the scope of the Sherman Act, it undoubtedly would have said so. *See also* Brief for Pet., *Anderson* (No. 306), at 79 (arguing that the challenged restraint, which prevented individual shipowners from hiring the seamen they deemed most suitable, was "destructive of competition not only as to the employee but also as to the employer," in part because it "would eventually lessen the standard of efficiency").

In *Radovich*, the plaintiff alleged that the labor practice at issue was part of an alleged "conspiracy to boycott the All-America Conference and its players with a view to its destruction." 352 U.S. at 449. Thus, there can be no doubt that the restraint at issue in *Radovich* also was alleged to have adverse effects on the product market.

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Professor Cox wrote years ago: "No one seriously suggests that antitrust policy should be concerned with the labor market per se." Archibald Cox, *supra*, 104 U. Pa. L. Rev. at 254. More recently, Professor Handler, citing *Apex Hosiery*, observed that "Congress did not intend that the anti-trust laws reach conduct by a union, or anyone else, unless such conduct had a direct, substantial effect on 'commercial' competition in the provision of goods and services." Milton Handler, *supra*, 82 Colum. L. Rev. at 1341.

No less an interested party than the AFL-CIO has agreed, acknowledging in a brief submitted to this Court:

> The product market, not the labor market, is the proper domain of the antitrust laws, and activity in the labor market to set wages, hours and working conditions . . . is not within their purview.

Amicus Curiae Brief for AFL-CIO, *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (No. 48), at 8. Thus, as the AFL-CIO recognized, "agreements among employers acting

alone, without the intervention of a union, to fix labor standards would . . . have no antitrust implications." *Id.* at 8 n.5. This Court should again so confirm.

III. ANY NECESSARY ACCOMMODATION OF THE ANTITRUST AND LABOR LAWS WOULD REQUIRE AFFIRMANCE OF THE JUDGMENT.

The antitrust laws are premised on a model of free competition. The labor laws, in contrast, are premised on a model of countervailing power and organized negotiation, with combinations and "collusive activity" not only authorized, but encouraged and often required, for both employees *and* employers. *See* pp. 11-15, above. *Both* are "expression[s] of fundamental national policy," as the government has acknowledged. U.S. Br. 10; Pet. App. 122a.

To the extent that the two schemes conflict, this Court has recognized an exemption from the antitrust laws to accommodate "the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets." *Connell Constr.*, 421 U.S. at 622; *see also Jewel Tea*, 381 U.S. at 689 (White, J.) (exemption "accommodat[es] the coverage of the Sherman Act to the policy of the labor laws").

Such an accommodation would be necessary here only if this Court were to conclude (a) that the competition interest asserted by petitioners arises from the antitrust laws and (b) that restraints limiting competition solely in labor markets are within the scope of the antitrust laws.[15] If it so concludes,

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[15] None of this Court's prior decisions addressing the nonstatutory labor exemption presented the issue addressed by Part II, above; each involved an alleged *product* market restraint. *See, e.g., Connell Constr.*, 421 U.S. at 635 (addressing the restraint's "potential for restraining competition *in the business market* in ways that would not follow naturally from elimination of competition over wages and working conditions"

the Court must determine whether the appropriate accommodation of these two "fundamental national polic[ies]" is one that insulates from antitrust challenge only collective bargaining agreements, as petitioners contend, or one that embraces the "practice and procedure of collective bargaining," 29 U.S.C. § 151, as the courts of appeals have consistently held.

A. The Exemption Prescribed By The Courts of Appeals — Limited To Actions Lawfully Taken As Part Of The Collective Bargaining Process — Is The Only Proper Accommodation Of The Congressional Policies Favoring Collective Bargaining And Free Competition In Business Markets.

Recognizing that federal labor policy focuses on collective bargaining as a process, both the court of appeals below and the Second Circuit have recently held that the nonstatutory labor exemption must embrace "all lawful actions taken by either unions or employers pursuant to the collective bargaining process." Pet App. 20a; *accord Williams*, 45 F.3d at 693. These holdings reflect the fact that, as the government has acknowledged, the labor laws' embodiment of a *process* for

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(emphasis added)); *Jewel Tea*, 381 U.S. at 681, 682 (White, J.) ("the complaint [alleged a conspiracy] to prevent the retail sale of fresh meat before 9 a.m. and after 6 p.m." and "adversely affected the general public"); *Allen Bradley Co.*, 325 U.S. at 798 (the manufacturers "brought this action because of their desire to sell their products in New York City, a market area that had been closed to them"). *See generally Richards v. Neilsen-Freight Lines*, 810 F.2d 898, 905 (9th Cir. 1987) (Kennedy, J.) ("We understand *Connell* to hold that the nonstatutory exemption is unavailable to shield agreements reached outside the context of collective bargaining where the challenged action imposes direct restraints on a business market . . . .").

achieving labor goals is "an expression of fundamental national policy." U.S. Br. 10.

This narrowly tailored accommodation reflects precisely the approach to harmonizing the antitrust and labor laws called for by this Court's prior cases. In *Connell Construction*, the Court framed the issue in terms of the need to accommodate "the congressional policy favoring *collective bargaining* under the NLRA and the congressional policy favoring free competition in *business* markets." 421 U.S. at 622 (emphasis added). Similarly, in *Jewel Tea*, the Court spoke in terms of "accommodating the coverage of the Sherman Act to the *policy of the labor laws*." 381 U.S. at 689 (White, J.) (emphasis added).[16] Nonetheless, petitioners and the government assert that these holdings — and the similar holdings of other courts of appeals — offend a general canon of statutory construction that exemptions from the antitrust laws are disfavored and should be narrowly construed. They are wrong.

This Court has never invoked such a canon in its prior cases addressing the nonstatutory labor exemption. In fact, this Court has described the nonstatutory labor exemption as a "broad labor exemption from the antitrust laws." *Associated Gen. Contractors*, 459 U.S. at 539. The reason is clear. As the government expressly recognizes, and as this Court's precedents confirm, the labor laws are no less "an expression

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[16] The courts of appeals have also recognized that the purpose of the exemption is to protect "the collective bargaining *process* commanded by the labor laws." *Mid-America Regional Bargaining Ass'n v. Will County Carpenters Dist. Council*, 675 F.2d 881, 886 n.14 (7th Cir.) (emphasis in original), *cert. denied*, 459 U.S. 860 (1982); *accord Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 847 n.14 (3d Cir. 1974) ("To preserve the integrity of the negotiating *process*" (emphasis added)). *See also* Michael S. Jacobs & Ralph K. Winter, Jr., *supra*, 81 Yale L.J. at 22 (it is the "*structure* [that] is to be protected by law" (emphasis added)).

of fundamental national policy" than the antitrust laws. U.S. Br. 10. The government is therefore correct in acknowledging that if "there is a conflict between the labor laws and the antitrust laws such that both cannot be given full effect, . . . the antitrust laws should yield to the more specific, and later enacted, obligations of the NLRA." U.S. Br. 16-17 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992)); *accord* Pet. Br. 17.[17]

This is not a situation, as petitioners seem to imply, in which the statute to be harmonized with the antitrust laws prescribes some "particular substantive" result. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753 (1985). The NLRA instead prescribes a *process*, the "fundamental premise" of which is that *government will be excluded* except to ensure compliance with "the procedure alone." *H.K. Porter*, 397 U.S. at 108; *Insurance Agents*, 361 U.S. at 488; *see also American Ship Bldg.*, 380 U.S. at 317 (the "central purpose" of the NLRA was to create and to protect "the process of collective bargaining"); U.S. Br. 22 ("the NLRA focuses on the bargaining process"). Further, that process contemplates *collective* action by employees and by employers — a notion generally antithetical to the antitrust laws. Exposing lawful elements of the collective bargaining process to review by an antitrust court would inject the government into the collective bargaining process in a manner inconsistent with the "fundamental premise" of this statutory scheme.

The history of labor relations and associated antitrust litigation in professional sports — a regular cycle of union-sponsored antitrust litigation (including this suit), followed by

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[17] The plain language of Section 6 of the Clayton Act and the other statutory evidence upon which this Court relied in *Apex Hosiery*, *see* 301 U.S. at 503-04 & n.24, *at a minimum* reinforce this conclusion. *See* pp. 19-26, above. Because labor markets were not central to the concerns underlying the Sherman Act, the antitrust laws should yield to the NLRA.

a collective bargaining agreement, followed by more union-sponsored antitrust litigation — so confirms. The purpose of such litigation has never been to effectuate the antitrust objective of creating a truly competitive labor market; such lawsuits instead serve the union's *bargaining* objectives by invoking the prospect — or the reality — of the *government's* shaping the terms and conditions of employment.

Prior to their most recent collective bargaining agreement, the NFLPA funded and pursued numerous antitrust suits against the NFL, challenging terms and conditions of employment ranging from practice player salaries (*Brown*) to veteran free agency rules (*McNeil*) to pre-season pay for veteran players (*Tice*) to health insurance benefits (*Jackson*). *See White v. NFL*, 822 F. Supp. 1389, 1421 (D. Minn. 1993) ("the NFLPA has supported numerous player lawsuits challenging the legality of various NFL player restraints, and it has entirely funded the present class action [and] its predecessors *Powell* and *McNeil*").[18] In each case, the NFLPA was plainly "seeking to gain through the courts what they could not win at the bargaining table." *Powell v. NFL*, 678 F. Supp. 777, 781 n.9 (D. Minn. 1988), *rev'd with instructions to enter judgment for defendants*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991). Moreover, there was never any doubt, as petitioners' amici have candidly acknowledged, that

> regardless of the outcome of litigation, some collective bargain will eventually be reached; no one believes that either the owners or the players will permanently choose

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[18] Those NFLPA-funded cases include, in addition to this case (Pet. App. 95a): *White*, *supra*; *Powell*, *supra*; *Allen v. Chargers Football Co.*, No. CV-91-4322 CBM (C.D. Cal.); *Jackson v. NFL*, Civ. No. 4-92-876 (D. Minn.); *Joyner v. NFL*, Civ. No. 92-2876 (E.D. Pa.); *McNeil v. NFL*, Civ. No. 4-90-476 (D. Minn.); and *Tice v. Pro Football, Inc.*, Civ. No. 91-2314 (RCL) (D.D.C.).

> to forego their mutually dependent business opportunities. Thus, allowing employees to pursue their Sherman Act claims will likely alter the substance of the collective bargain . . . .

Brief for National Basketball Players Ass'n *et al.*, *Williams*, (2d Cir. No. 94-7709) ("NBPA Br."), at 27-28.

In fact, the terms and conditions of employment addressed by such suits were ultimately established not by operation of a competitive market, but rather through litigation settlements promptly incorporated, *in haec verba*, into a collective bargaining agreement. *White v. NFL*, 836 F. Supp. 1458, 1499-1500 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995). *See also* p. 5 n.3, above. This was not the first time that the NFLPA — or its counterpart in the NBA — had used the antitrust courts in this way. *See Alexander v. NFL*, 1977-2 Trade Cas. (CCH) ¶ 61,730, at 72,990 (D. Minn. 1987) ("NFLPA sponsored this action and the *Mackey* action"), *aff'd sub nom. Reynolds v. NFL*, 584 F.2d 280 (8th Cir. 1978); *id.* at 72,997 (litigation settlement "incorporates the [new] Collective Bargaining Agreement by reference"); *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 962 (D.N.J. 1987) ("the Players Association and the NBA . . . entered into a multi-year collective bargaining agreement that incorporated the substantive terms of the settlement agreement" in *Robertson v. NBA*). There is no doubt about the primary, if not the exclusive, purpose of such suits: using the antitrust courts to serve the union's *bargaining* objectives.

This case, and others like it involving antitrust challenges to collective bargaining conduct, are therefore very different from the implied immunity cases upon which petitioners and the government rely. As this Court has recognized, it is plain that Congress intended to oust the government from *any* role in the *process* of determining the terms and conditions of

employment of unionized employees. *See* pp. 11-15, above. Thus, here antitrust immunity "*must* be implied in order to permit the [NLRA] to function as envisioned by Congress," *i.e.*, without substantive government intervention. *Gordon v. New York Stock Exch.*, 422 U.S. 659, 688 (1975) (emphasis added). Otherwise, antitrust courts would be regulating terms and conditions of employment in unionized labor markets under the guise of the Sherman Act.[19]

In any event, the exemption as applied by the courts of appeals *is* narrowly tailored to the competing federal labor policy. As circumscribed by the D.C. and Second Circuits, the exemption applies only to conduct undertaken as part of the collective bargaining process, only to limitations on competition in the labor market, and then only to the extent of the relevant bargaining units. The antitrust laws continue to apply, for example, to unreasonable restraints on a product market. *Pennington*, *Jewel Tea*, and *Connell Construction* (as well as *Anderson* and *Radovich*) illustrate this point. Thus, the accommodation prescribed by the courts of appeals gives full effect to the core policies of the Sherman Act.

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[19] In light of Section 1's vagueness and generality (and even without regard to the substantive analysis of *Apex Hosiery*), any support for a different accommodation would plainly have to be derived from judicial development of the statute's substantive content, *see generally Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 354 (1982), and would depend less on express statutory language than on "a legal disposition implied by a statutory text." *United States v. Fausto*, 484 U.S. 439, 453 (1988). "This classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute. And that is what we have here." *Id.*

B. There Is No Requirement Of Union Consent For The Exemption To Apply.

The heart of petitioners' brief is an extended argument that "employee consent embodied in a written agreement is required" before the nonstatutory labor exemption applies. Pet. Br. 18 (emphasis deleted); *see id.* at 18-30. This argument has no support in this Court's precedents. As the court below recognized:

> each of the pertinent Supreme Court cases involved an antitrust challenge to a union-employer agreement. In such circumstances, the Court's reference to the nonstatutory labor exemption in terms of a potential shield from antitrust liability for such agreements is hardly surprising. Certainly, no Supreme Court case expressly limits the exemption in the manner suggested by the appellees.

Pet. App. 14a-15a (footnote omitted); *accord id.* at 44a (Wald, J., dissenting). A reading of those cases so confirms. *See also* U.S. Br. in Support of Cert. at 11 (issue is "one of first impression").[20]

The courts of appeals have consistently held that employee consent to the challenged restraint is *not* required for the exemption to apply. The Second Circuit, like the D.C. Circuit below, recently confirmed that "the antitrust laws

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[20] Petitioners' heavy reliance (at 20) on passages from *Jewel Tea* is particularly misleading. The opinions of Justice White and Justice Goldberg, each representing the views of three Justices, both *endorsed* immunity for the challenged restraint; the issue between them (which is irrelevant here, *see* J.A. 341) was whether the nonstatutory exemption should be *limited* to restraints that principally affect the labor market. 381 U.S. at 691 (White, J.); *id.* at 721-22 (Goldberg, J.). Neither opinion supports petitioners' position that union consent is *necessary* for the exemption to apply, an issue that the Court did not even address.

do not prohibit employers . . . from implementing their joint proposals in the absence of a CBA, or from using economic force to obtain agreement to those proposals." *Williams*, 45 F.3d at 693. The Eighth Circuit is in accord. *Powell v. NFL*, 930 F.2d 1293, 1298, 1303 & n.10 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991). Other courts of appeals have agreed.[21] No appellate court has reached a contrary holding.[22]

A union consent requirement is utterly incompatible with multiemployer bargaining. Indeed, petitioners themselves ultimately acknowledge that union consent cannot be the test. Pet. Br. 40 (recognizing that lockouts, hiring of replacement workers, and strike insurance are protected). Petitioners' acknowledgment is confirmed by the government:

> Some joint action by employers in a multi-employer bargaining unit must, of course, fall within an implied exemption if the collective bargaining regime is to operate. Thus, resumption of good-faith bargaining between the union and the employers in the multi-employer bargaining unit to reach a new agreement would be within the implied exemption, just as the bargaining to negotiate the expired contract was exempt.

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[21] *E.g.*, *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers*, 431 F.2d 1004, 1007 (5th Cir. 1970) (refusal to deal with a union), *cert. dismissed*, 404 U.S. 801 (1971); *Newspaper Drivers & Handlers' Local No. 372 v. NLRB*, 404 F.2d 1159, 1163 (6th Cir. 1968) (lockout), *cert. denied*, 395 U.S. 923 (1969); *Kennedy v. Long Island R.R. Co.*, 319 F.2d 366, 373 (2d Cir.) (strike insurance plan), *cert. denied*, 375 U.S. 830 (1963).

[22] The issue presented in the cases upon which petitioners rely (at 22 n.13) was not whether union consent was *necessary* for the exemption to apply, but rather whether union consent was *sufficient* to require application of the exemption. *See, e.g.*, *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

U.S. Br. 18 n.5. Similarly, Judge Wald, dissenting below, recognized that "if the collective bargaining process is to work without undue interference from antitrust law, multi-employer 'bargaining tactics' must fall within the scope of the nonstatutory labor exemption." Pet. App. 53a n.7.[23]

The absence of a "consent" requirement is easily demonstrated. For example, it has long been recognized that multiemployer lockouts, which are undertaken without employee consent, are protected from antitrust liability.[24] Petitioners acknowledged below and in this Court that members of a multi-employer bargaining unit could not "be held liable for locking out employees to gain an advantage in negotiations." Pet. App. 22a-23a; Pet. Br. 40; *accord* Pet. App. 53a n.7 (Wald, J., dissenting); *Williams*, 45 F.3d at 691-92; *see also* AFL-CIO Amicus Curiae Br., *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) (No. 81-334) ("AFL-CIO Br."), at 16-17 (The exemption applies to "businesses as well as unions. . . . [T]he lockout is no more subject to anti-trust regulation than the strike."). *But see* U.S. Br. 18 n.5. And that is true even though a lockout — a concerted refusal to deal — restrains

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[23] The premise for petitioners' "consent" notion is their assumption (at 18-19) that the nonstatutory exemption "derives from . . . the so-called 'statutory labor exemption'" reflected in Sections 6 and 20 of the Clayton Act and the Norris-LaGuardia Act, which in their view protect only unions. Pet. Br. 18-19, 21. Petitioners' assumption is incorrect, as the government points out: "the implied labor exemption to the Sherman Act recognized in *Jewel Tea* is in fact firmly grounded in the requirements of another statutory enactment, the NLRA." U.S. Br. 14.

[24] *See generally, e.g.*, *American Ship Bldg.*, 380 U.S. at 315 (recognizing "the legitimacy of [lockouts] as a means of applying economic pressure in support of bargaining positions"); *Buffalo Linen*, 353 U.S. at 93 (approving lockout "to preserve the multi-employer bargaining basis").

the labor market far more severely than the uniform salary term at issue here.

In short, employee consent to the challenged restraint — in contrast to employee consent to the collective bargaining *process* — is not required for application of the nonstatutory labor exemption.

C. There Is No Principled Basis For Terminating The Exemption In The Midst Of The Collective Bargaining Process.

Although the government agrees that the nonstatutory labor exemption does not require union consent to the challenged employment terms, it would nonetheless truncate the exemption some time soon after impasse, thereafter exposing to antitrust liability otherwise lawful bargaining conduct of a multiemployer unit. No statute, precedent, or logical principle supports this position, which rests on the incorrect premise, reflected in the dissenting opinion below, that at impasse "an agreement is no longer in sight or even being sought" and "hope [no longer] exists that an agreement may be reached." Pet. App. 60a, 54a.

This Court's decisions and those of the NLRB make clear that impasse is an *intermediate stage* of the collective bargaining process — not its end. Thus, in *Bonanno Linen*, the Court observed that impasse is "a recurring feature in the bargaining process, . . . only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'" 454 U.S. at 412 (quoting NLRB decision).[25]

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[25] Numerous NLRB decisions, rejecting the premise of the dissent below, are in accord. *See, e.g., Circuit-Wise, Inc.*, 309 N.L.R.B. 905, 921 (1992) ("a genuine impasse is not the end of collective bargaining"; economic pressure, such as "unilateral changes in working conditions . . .

Nothing in the NLRA — or in the policies of the antitrust laws, for that matter — even suggests that antitrust challenges to joint actions of a multiemployer bargaining unit should be allowed to intrude in the *continuing* collective bargaining process at impasse. Indeed, "it is precisely at and during impasse . . . that the need for a stable, predictable bargaining unit becomes acute." *Bonanno Linen*, 454 U.S. at 413 & n.8 (citing NLRB brief). For that reason, labor law *requires* that after impasse, members of a multiemployer bargaining unit continue to bargain *as a unit* for a new permanent agreement; "impasse is not sufficiently destructive of group bargaining to justify unilateral withdrawal." *Id.* at 412. Accordingly, as Chief Judge Edwards observed below, the government's proposal does not "make[] the slightest sense under established labor law principles." Pet. App. 20a-21a; *see also* pp. 38-44, below.[26]

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usually breaks the stalemate"); *Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22, 23 (1973) ("impasse is not the end of collective bargaining"), *enforcement denied on other grounds*, 500 F.2d 181 (5th Cir. 1974). "[A]ssessing the significance of impasse and the dynamics of collective bargaining is the kind of judgment that *Buffalo Linen* ruled should be left to the Board." *Bonanno Linen*, 454 U.S. at 413.

[26] Petitioners urge (Pet. Br. 45-47) that the exemption should end even earlier — with the expiration of the collective bargaining agreement. Petitioners' counsel squarely rejected that position when he represented the government in *Powell*. As the government continues to recognize, petitioners' "position cannot be reconciled with the obligation of employers under federal labor law to maintain the terms of employment established by an expired collective bargaining agreement until impasse." U.S. Br. 16 (citing *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962)); *accord* U.S. Br. In Support of Cert., *Powell* (No. 89-1421), at 11-12.

D. There Is No Principled Basis For Selectively Excluding From The Exemption The Employers' Right Unilaterally To Implement Their Good Faith Bargaining Proposal At Impasse.

Petitioners acknowledge that members of a multiemployer unit may, without antitrust exposure, collectively "lock out their employees," "hire replacement workers," "contribute to a strike insurance fund," and "withdraw certain benefits contained in an expired bargaining agreement, [including] a minimum salary requirement." Pet. Br. 40. They nonetheless assert that the economic weapon at issue here — the employers' right unilaterally to implement terms proposed to the union and bargained in good faith to impasse — should be subject to antitrust liability. There is no principled basis for this assertion.[27]

This Court has recognized that the employer's right at impasse to "institute unilaterally the working conditions which he desires" is one of the lawful "tools of economic self-help" available to be used in the collective bargaining process. *American Ship Bldg. Co.*, 380 U.S. at 316; *accord Colorado-Ute Elec. Ass'n, Inc. v. NLRB*, 939 F.2d 1392, 1404 (10th Cir. 1991) ("employer may try to achieve the wage terms it desires by using its economic weapon of implementing at impasse"), *cert. denied*, 504 U.S. 955 (1992).

The NLRB also has recognized for decades that the employers' right to implement at impasse is a legitimate

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[27] Petitioners recognize that outside professional sports, "post-impasse implementation of employment terms by employer associations has not elicited significant antitrust challenge to date and is unlikely to do so in the future." Pet. Br. 39. The reason, of course, is that there has never been any doubt that the economic weapons available to individual employers are also available to multiemployer bargaining units, which function as a single entity in the collective bargaining process. *See* p. 12, above.

"bargaining tactic." In *Bonanno Linen* itself, the Board held that at impasse, the employer may

> place into effect those wage increases or benefits it has theretofore offered, an action (or the possibility of it) which may substantially shift the bargaining positions of the parties. In *these* and other possible *uses of impasse as a bargaining tactic*, the emphasis is toward achieving agreement . . .

Charles D. Bonanno Linen Serv., Inc., 243 N.L.R.B. 1093, 1094 (1979) (emphasis added); *see also Bonanno Linen*, 454 U.S. at 415-16 n.9 (describing NLRB's view of the "weapons at [the employer's] disposal for exerting economic pressure. It may engage in a lockout, make unilateral changes in working conditions if they are consistent with the offers the union has rejected, hire replacement workers . . . ."). More recently, in *Circuit-Wise, Inc.*, the Board again confirmed that under the labor-law scheme, the employers' unilateral implementation of terms and conditions of employment is no less a legitimate bargaining tactic than a lockout:

> Once a genuine impasse is reached, the parties can concurrently exert economic pressure on each other: the union can call for a strike; the employer can engage in a lockout, make unilateral changes in working conditions if they are consistent with the offers the union has rejected, or hire replacements to counter the loss of striking employees. Such economic pressure usually breaks the stalemate.

309 N.L.R.B. at 921 (quoting *Hi-Way Billboards, Inc.*, 206 N.L.R.B. at 23). Thus, acceptance of the position advanced by petitioners would require this Court not only to depart from *American Ship Bldg.*, but also to "substitute [its] judgment for those of the Board with respect to the issues that Congress intended the Board should resolve." *Bonanno Linen*, 454

U.S. at 418 (addressing rights of employers at impasse). This the Court should not do. *Id.*

There is nothing in the case law, in federal labor policy, or in federal antitrust policy that would warrant treating this right differently from other authorized "tools of economic self-help," all of which were intended by Congress to be "unrestricted by *any* governmental power to regulate." *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 141 (1976) (quotation omitted) (emphasis in original); *id.* at 147 ("[r]esort to economic weapons . . . is the right of the employer" (quotation omitted)); *Golden State Transit*, 475 U.S. at 614 (laws that interfere with the bargaining process by "imposing additional restrictions on economic weapons of self-help" must give way). To the contrary, as organized labor has recognized,

> Neither the National Labor Relations Board, nor the state courts, nor the federal courts under the antitrust laws or otherwise may function as 'arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.'

AFL-CIO Br. at 17 (quoting *Insurance Agents*, 361 U.S. at 489, 497); *see also id.* at 18 ("Whatever effects the antitrust laws may otherwise have on labor relations, those laws are in our view excluded absolutely from regulating coercive measures directed by businesses against unions . . . in bargaining over the terms of a collective bargaining agreement.").

Thus, there is no basis for Judge Wald's proposed distinction between (1) unilateral imposition of terms — which she characterized as "the end-product of an unsuccessful bargaining process" and "simply the way the employer decides to run his business in the absence of any bargaining agreement" — and (2) "bargaining tactics" like lockouts that "put

pressure on the other bargaining party to reach an agreement." Pet. App. 53a-54a (emphasis deleted). This purported "distinction" and its underlying premises have been squarely and repeatedly rejected by this Court and by the Board in the exercise of its "specialized judgment." *Buffalo Linen*, 353 U.S. at 96; *see* pp. 38-39, above.

First, as demonstrated at pages 36-37, above, impasse does *not* end the bargaining process. Second, there is no merit to the notion, also adopted by petitioners, that the right to implement unilaterally at impasse "is simply an exercise of the employers' residual, common law rights to operate their businesses." Pet. Br. 34. That notion is refuted by the continuing and extensive labor-law regulation of the implementation right at and after impasse. Unlike at common law, employers engaged in collective bargaining may not simply dictate terms of employment; they may implement *only* those terms that have been negotiated in good faith to impasse. *International Ass'n of Fire Fighters*, 304 N.L.R.B. 401, 402 (1991); *Storer Communications, Inc.*, 294 N.L.R.B. 1056, 1090 (1989). Indeed, they may not even implement terms *more favorable to employees* than those that have been proposed to the union. *NLRB v. Katz*, 369 U.S. 736, 745 (1962).[28] In any event, the employer's right to implement at impasse is a "right" safeguarded by the labor laws, not the common law. *See Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 111 (1989) (parties' *right* to make use of economic weapons, including those "not explicitly set forth in

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[28] There is also no basis for petitioners' assertion (Pet. Br. 36) that, despite a consistent line of NLRB precedents to the contrary, unilateral implementation of terms should be distinguished because it is "painful" only for employees. Unilateral implementation is no more painful for employees, and affords the employer no more benefits, than the hiring of replacement workers, which petitioners acknowledge (*id.* at 40) is within the scope of the exemption.

the Act," is a federal right protected from government interference).[29]

Furthermore, excluding from the exemption the employers' right to implement at impasse would run counter to federal labor policy, which seeks to sustain throughout the collective bargaining process a careful balance "unrestricted by any governmental power to regulate the substantive solution of [the parties'] differences." *Insurance Agents*, 361 U.S. at 488. The employers' right to implement at impasse is a counterweight to the additional economic weapon that, under the labor laws, the union secures at impasse: the right to make *interim* agreements with individual members of the

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[29] Petitioners (but not the government, which does not join the argument or even cite the cases) rely heavily on this Court's preemption cases, such as *Livadas v. Bradshaw*, 114 S. Ct. 2068 (1994), *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), and *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), in an effort to show that the federal antitrust laws are part of a legal "backdrop" on which employees "are entitled to rely" after impasse. *See* Pet. Br. 29-30. None of those cases even remotely supports their position. In *Fort Halifax* and *Metropolitan Life*, the Court rejected direct preemption challenges to *state* regulatory regimes that provided *precisely defined* substantive entitlements to certain benefits; the Court held that such state regulation does not "undercut[] collective bargaining" because "the NLRA is concerned with ensuring an equitable bargaining process, not with the substantive terms that may emerge from such bargaining." *Fort Halifax*, 482 U.S. at 20 (citing *Metropolitan Life*). What petitioners propose here is fundamentally different: an active role for antitrust courts in collective bargaining, where federal judges and juries would determine, pursuant to the *imprecise* standards of the Sherman Act, what terms and conditions of employment are "reasonable." This would interfere with the collective bargaining process even more than the state law regime preempted in *Livadas*, which created disincentives for unions to seek collectively bargained arbitration clauses. 114 S. Ct. at 2078, 2082, 2085. None of these cases suggests, as petitioners contend, that at impasse employees are entitled to invoke antitrust courts as a vehicle to increase their leverage in collective bargaining.

multi-employer bargaining unit, and thereby to "whipsaw" management. *See Bonanno Linen*, 454 U.S. at 415-16 & n.9. The economic force of this added right is significant. Indeed, the dissenters in *Bonanno Linen* argued:

> By allowing the union to negotiate interim agreements in order to whipsaw the employer group and yet denying the employers the necessary defense of withdrawal [from the multiemployer collective bargaining unit], the Board is hardly living up to its asserted — and mandated — commitment to evenhandedness.

Id. at 423 (Burger, C.J., and Rehnquist, J., dissenting). Thus, the right to implement proposals at impasse is necessary to *maintain* the pre-existing balance of economic weapons authorized by the labor laws; subjecting that right to antitrust liability would fundamentally alter that balance.

Petitioners imply that in the absence of an antitrust remedy, unionized employees would have no recourse if employers, exercising their right to implement, were to impose harsh or unduly restrictive terms. That suggestion entirely overlooks (1) the array of economic weapons available to the union at impasse, including the right to strike and the right to whipsaw members of the bargaining unit, (2) the labor law limits on the employers' exercise of their right and the availability of labor law remedies to enforce those limits,[30] (3) the continuing obligation of employers to engage in good faith bargaining once negotiations resume, and (4) the temporary nature of the implemented terms, which last only until a new collective bargaining agreement is reached, *see* p. 5 n.3, above. In short, petitioners — who six years ago "invoke[d]

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[30] *See, e.g., Silverman ex rel. NLRB v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054 (2d Cir. 1995) (sustaining injunction barring unilateral implementation of terms for baseball players because employers had not bargained in good faith to impasse).

the antitrust laws and their threat of treble damages to gain an advantage in bargaining over a salary provision about which union members [did] not care deeply enough to strike" (Pet. App. 20a) — have once again simply ignored the collective bargaining process.

E. The Position Advanced By Petitioners And The Government Would Make Multiemployer Bargaining Unworkable.

Multiemployer bargaining, by definition, requires joint action by employers. Both petitioners (Pet. Br. 40) and the government (U.S. Br. 18 n.5) concede that some joint bargaining conduct by employers must be immune from antitrust attack if multiemployer bargaining is to operate at all. But petitioners and the government fail to recognize that their arguments, if accepted, would make multiemployer bargaining unworkable.

Labor law gives employers a limited set of options at impasse: they may maintain the status quo, implement the terms of their last offer, or lock out their employees. A member of a multiemployer unit has an additional option: it may enter into a separate, interim agreement with the union, but it may not withdraw from the multiemployer unit, and it must resume joint bargaining once the impasse is broken.

The government would effectively rule out every one of the employers' options except separate interim agreements with the union. The government contends (U.S. Br. at 18 n.5) that *any* joint action following impasse, apart from a renewal of joint bargaining, is subject to antitrust scrutiny and indeed may well constitute a *per se* antitrust violation. Under this view, after impasse employers would simultaneously be obligated (1) by the labor laws to discuss *collectively* proposed *future* terms of employment and (2) by the antitrust laws to act *independently* with regard to *current* terms of employment. Such obligations would place employers in an untenable

position — required to continue joint discussions, yet facing potential allegations, from employees eager to seek a bargaining advantage, that each joint meeting is evidence of a *per se* antitrust violation. That prospect — and the treble damage risk that it entails — would discourage multiemployer bargaining in the first instance, and thereby undermine "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *Buffalo Linen*, 353 U.S. at 95.[31]

Petitioners, unlike the government, concede that joint lockouts must be immunized if multiemployer bargaining is to work. Pet. Br. 40 (citing Pet. App. 53a-54a n.7 (Wald, J., dissenting)). But petitioners' position is also incompatible with the collective bargaining process established by Congress. By depriving members of multiemployer units of the "intermediate options" afforded by labor law (implementing proposed terms, continuing to maintain the status quo), petitioners would force employers to make a drastic choice between a lockout and capitulation to the union's demands. Such a dramatic alteration of the collective bargaining process would harm both employees and employers, and would be utterly inconsistent with national labor policy.

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[31] Furthermore, truncating the exemption soon after impasse would encourage labor not to reach agreement, but instead to force or feign impasse to gain not only the coercive advantage of a treble damage antitrust threat, but also the opportunity to seek new terms and conditions of employment through antitrust injunctive relief. The government itself acknowledges that "those concerns are not without some substance." U.S. Br. 24. Indeed, that is precisely what happened in *Powell* after the district court erroneously ruled that the exemption expires at impasse; on the first business day following that ruling, and notwithstanding the court's suggestion that the parties were not then at impasse, the NFLPA advised the NFL, *for the first time*, that the parties had reached impasse. *See Powell*, 930 F.2d at 1296; *see also Powell*, 678 F. Supp. at 789 n.22 (noting that parties "are not so far apart in negotiations as this lawsuit would suggest").

These concerns are particularly compelling in the context of professional sports leagues. Although multiemployer bargaining is generally a voluntary matter for both employers and employees, that is not the case for the interdependent members of a sports league; in order even to produce their joint product, they must cooperate in many respects, including in determining numerous common terms and conditions of employment that are mandatory subjects of bargaining. *See North Am. Soccer League v. NLRB*, 613 F.2d 1379, 1383, 1389 (5th Cir.) (affirming NLRB determination that teams in a soccer league must bargain as a "joint employer"), *cert. denied*, 449 U.S. 899 (1980). *See generally NCAA v. Board of Regents*, 468 U.S. 85, 101 (1984) ("[S]ome activities can only be carried out jointly. Perhaps the leading example is sports leagues." (quoting Robert Bork, *The Antitrust Paradox* 278 (1978))); *NFL v. North Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of certiorari) ("consistency of staffing, rules, [and] training . . . are at least arguably necessary to permit the league to create an appealing product in the entertainment market"). As petitioners' amici, the NBA Players Association, informed the Second Circuit: in professional sports, "regardless of the outcome of litigation [over terms and conditions of employment], some collective bargain will eventually be reached." NBPA Br., *Williams*, at 27.

Thus, two courts of appeals and the NLRB have recognized that "sports leagues are an exception to the principle of voluntariness" in multiemployer bargaining.

> In the sports industry, multiemployer bargaining exists [in part] because some terms and conditions of employment must be the same for all teams . . . . Unlike the industrial context in which many work rules can differ from employer to employer . . . sports leagues need many common rules. Number of games, length of season, playoff structures, and roster size and composition are

> just a few of the many kinds of league rules that are typically bargained over by sports leagues and unions of players.

Williams, 45 F.3d at 689; *accord North Am. Soccer League*, 613 F.2d at 1381-83. Indeed, the NLRB has twice expressly held that the member clubs of the NFL "constitute a single employer for bargaining purposes." *NFL Management Council*, 203 N.L.R.B. 958, 961 (1973), *remanded on other grounds*, *National Football League Players Ass'n v. NLRB*, 503 F.2d 12 (8th Cir. 1974); *NFL Management Council*, 309 N.L.R.B. 78, 92 (1992).

Because of the need for many common terms and conditions of employment, the positions advanced by petitioners and the government, if adopted by the Court, would inevitably cause chaos, if not a complete shutdown of league operations, upon the expiration of every collective bargaining agreement. For example, an interim agreement at impasse between the union and one NFL club — increasing that club's roster size, or reducing the number of regular season games for its players, or committing that club to treat as free agents rookies drafted by other clubs — would cripple the League's ability jointly to produce its common product, which by its very nature requires that numerous terms and conditions of employment be common to all clubs.

To the extent that restraints in a labor market adversely affect competition interests, those interests are most compelling when a market is restrained by the *voluntary* and *unauthorized* joining together of *independent* competitors. None of those circumstances is present in professional sports. Therefore, whatever accommodation of the antitrust and labor laws may be appropriate in industries in which independent competitors voluntarily join together for collective bargaining purposes, there can be no question about the appropriate result here: Members of a compulsory multiemployer unit like a

professional sports league, which are expected to function as a single entity for collective bargaining purposes, cannot be subject to antitrust scrutiny for engaging jointly in conduct that would otherwise be lawful for a single employer and that must be available for the collective bargaining process to work as intended by Congress.[32]

CONCLUSION

Petitioners and their union claim that they are entitled to the benefits of *both* the labor laws (the right to combine for bargaining leverage, the right to strike, the right to compel good faith negotiation by their employers) and the antitrust laws (the right to secure treble damages and injunctive relief from federal courts) for use in determining, through *collective bargaining*, the terms and conditions of their employment. That position is fundamentally wrong because the cornerstone of federal labor policy is the complete *exclusion* of government, including antitrust courts, from the collective bargaining process.

Petitioners and their union also claim that, in addition to exercising antitrust "rights" as a weapon in the collective

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[32] The "often tempestuous" relationship between professional sports leagues and their employees cannot be attributed to the recent labor antitrust cases, as petitioners assert; those tensions can be traced to the origins of professional sports. *Powell*, 930 F.2d at 1303. Indeed, the recent decisions of the D.C. and Second Circuits have plainly contributed to stabilizing labor relations in professional sports. After the decision below, the NFL and the NFLPA agreed to extend their collective bargaining agreement into the next century; after *Williams*, the NBA and the NHL reached agreements with their unions that will ensure labor peace for many years to come. Petitioners' proposal, in contrast, would ensure, upon the expiration of each league's collective bargaining agreement, resumption of the chaotic cycle of union-sponsored antitrust litigation, resolved by a collective bargaining agreement, and more union-sponsored antitrust litigation, that is fundamentally at odds with national labor policy.

bargaining process, they are entitled also to receive the benefits of *multiemployer* bargaining (*e.g.*, pensions, injury protection, and the extraordinary earning opportunities made possible by the *necessarily* common terms and conditions of employment in the NFL). That position is fundamentally wrong because their proposed use of the antitrust laws assumes that the employers are *independent competitors* that may not engage in coordinated conduct, while multiemployer bargaining assumes that the employers will function as a *single entity* in collective bargaining.

Petitioners' position is demonstrably inconsistent with both the labor-law and the antitrust regimes and, if sustained, would create chaos in multiemployer bargaining throughout the United States.

The judgment of the court of appeals should be affirmed.

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STATUTORY APPENDIX

1. Section 6 of the Clayton Act, 15 U.S.C. § 17, provides:

   The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

2. Section 20 of the Clayton Act, 29 U.S.C. § 52, provides, in part:

   No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

3. Section 2 of the National Labor Relations Act, 29 U.S.C. § 152, provides, in part:

> (1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under Title 11, or receivers.
>
> (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly . . . .

4. Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), provides, in part:

> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

5. Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), provides in part:

> (a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

6. Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, provides, in part:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

* * * * *

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this act [29 U.S.C. § 103];

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

* * * * *

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; . . . .

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No. 95-388

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,
Petitioners,
v.
PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

STATEMENT

The central issue before the Court is whether the Sherman Act ceases to apply to salary-fixing restraints unilaterally imposed by a group of employers on a previously competitive labor market simply because the employees have exercised their right to engage in collective bargaining. Respondents and their army of *amici* have generated considerable flak, but their counterattacks have both missed the essential issue and skirted entirely the compelling facts underlying petitioners' antitrust claim.

The labor market involved in this case is a competitive market restrained by a classic monopsony. By virtue of their total control over the production and marketing of major professional football in the United States,[1] the NFL clubs are the only available purchasers of the uniquely valuable services of top-level professional football players —services for which the clubs are admittedly direct business competitors, J.A. 58, 74. If respondents collude to eliminate interclub competition in this labor market, they can exploit their monopsony power at the expense of the players, producing a misallocation of economic resources and inevitably diminishing the quality of the football product—the economic equivalent of a price increase for fans.[2]

The salary-fixing scheme imposed by respondents in 1989 was precisely such an anticompetitive monopsonistic restraint. This complete elimination of competition among

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[1] J.A. 35. In 1986, a jury found that "the NFL had willfully acquired or maintained monopoly power in a market consisting of major-league professional football in the United States." *United States Football League v. NFL*, 842 F.2d 1335, 1341 (2d Cir. 1988).

[2] *See* Pet. App. 39a-41a (Wald, J., dissenting); Roger D. Blair & Jeffrey L. Harrison, *Monopsony* 42-43, 72 (1993); Herbert Hovenkamp, *Economics and Federal Antitrust Law* § 1.2, at 17-18 (1985); Richard A. Posner & Frank H. Easterbrook, *Antitrust* 150 (1981).

the clubs drastically slashed the salaries of petitioners to one-fifth the market value of their services in 1989. The NFL owners pocketed the difference, amounting to more than $10 million. The clear aim of the clubs' collusive enforcement of Resolution G-2's fixed salary was to suppress competitive bidding among clubs for the services of developmental squad players.[3]

In defense of carte blanche antitrust immunity for such anticompetitive employer collusion, the NFL clubs and their *amici* have advanced an assortment of fallacies, false alarms and hyperbole.

First, they insist that the National Labor Relations Act displaces all federal and state laws that might otherwise constrain unilateral employer conduct throughout the sphere of collective bargaining. That absolutist position, however, has repeatedly been rejected in this Court's recent labor preemption decisions and cannot be squared with the Court's nonstatutory exemption precedents.

Next, respondents and their *amici* vociferously assert that antitrust review for salary restraints unilaterally imposed by the NFL clubs will decimate multi-employer bargaining in all industries across the United States. That contention is preposterous and demonstrably false. Outside the relatively narrow fields of sports and entertainment, other industries with multi-employer bargaining typically have *no competitive labor markets* and employers lack the monopsony power enjoyed by the NFL clubs. In total contrast to athletes and other talented performers whose individual services command higher value in a competitive market, employees in more conventional industries acting through their unions have accepted the standardization of employment terms precisely because competition in these

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[3] The $1,000 per week salary fix was manifestly not imposed to address the "stashing" of players. Resp. Br. 4. Any possibility that valuable players might be "stashed" on developmental squads was eliminated by Resolution G-2's stipulation that no player could be signed to a developmental squad without first being made available to other clubs through the waivers process.

industries would drive wages and other labor costs *down*, not *up*. Those employees would have no incentive to bring the sort of antitrust actions that have arisen in professional sports, and because the employees themselves have foreclosed the possibility of individual bargaining, such hypothetical actions could not state a claim for antitrust liability.

Indeed, the NFL clubs and their *amici* frankly concede that employees in other industries have "no 'competition' interest of the kind asserted by petitioners," Resp. Br. 17.[4] For the very reasons conceded by respondents, it is not at all surprising then that for decades the lower courts in fact applied the limited consent-based labor exemption advocated by petitioners without producing any effects whatsoever on multi-employer bargaining in industries other than professional sports.

Moreover, antitrust review of employer conduct in professional sports and similar industries does not threaten multi-employer bargaining. Respondents' arguments to the contrary are based on the fallacious premise that antitrust review would automatically render illegal any and all concerted action by an employer association. That argument is a bugbear that reveals a basic misunderstanding of substantive antitrust law, which tolerates a broad range of joint conduct.

Finally, in an unabashed effort to avoid the flawed reasoning of the majority below (particularly the stark and

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[4] *See also* Opp. to Pet. for Cert. 24, 25 ("the question presented has not arisen outside professional sports," and "there is no reason to assume" the Court's decision "will have a material impact on collective bargaining in any market" since "the professional sports industry has . . . very different economic imperatives than other industries") (internal quotation marks omitted); Brief for Associated General Contractors as *Amicus Curiae* (hereinafter "Associated General Contractors Br.") 9 ("The economic structure and nature of collective bargaining in the professional sports and entertainment industries differ from th[e] typical pattern in fundamental respects."); *id.* at 9-10, 16.

perverse inequality it creates between employees who opt for collective bargaining and those who do not), respondents resort to an even more radical claim: that the Sherman Act can never reach restraints on competition in any labor market, even where there is no collective bargaining and thus no purported conflict with the NLRA. That claim is an old rusty favorite of respondents that was dismissed by this Court as "lacking in merit" nearly 40 years ago in *Radovich v. NFL*, 352 U.S. 445, 454 (1957), and that has been thoroughly repudiated by every court to hear it since.

In sum, there is no clear conflict between the Sherman Act and the NLRA that supports the broad exemption crafted by the majority below. The labor law interest in collective bargaining does not require immunity for a fixed salary imposed by employers in lieu of a bargaining agreement in industries where salaries have been individually negotiated. Blanket antitrust immunity for employer associations would not preserve and enhance multi-employer bargaining in such industries. The freedom given to employer groups to engage in the sort of salary fixing exhibited here would, in fact, result in less collective bargaining and inevitably foster union decertifications and a disruptive cycle of labor strife anathema to the core purposes of the NLRA.

ARGUMENT

I. THE NLRA DOES NOT OVERRIDE ALL OTHER LAWS THAT MAY APPLY TO COLLECTIVE BARGAINING RELATIONSHIPS, AND IN PARTICULAR THE IMPASSE DOCTRINE DOES NOT GIVE EMPLOYERS CARTE BLANCHE TO IMPOSE TERMS OF EMPLOYMENT THAT ARE OTHERWISE ILLEGAL.

Respondents proclaim that the collective bargaining process is "the *exclusive* means of determining terms and conditions of employment in unionized industries" and that the NLRA impliedly requires "the complete exclusion

of the government, including antitrust courts, from any substantive role in the bargaining process." Resp. Br. 8 (emphasis in original); *see id.* at 10, 11-15, 29. *See also* Brief for Chamber of Commerce, *et al.*, as *Amici Curiae* (hereinafter "Chamber Br.") 8-9, 13.

That claim blithely ignores the most basic teachings of this Court's nonstatutory labor exemption precedents, which establish that parties retain their rights under both the antitrust and labor laws. *See Connell Construction Co. v. Plumbers & Steamfitters Local No. 100,* 421 U.S. 616, 634 (1975). Indeed, even the terms of a collective bargaining agreement concerning "a compulsory subject of bargaining" under the NLRA are not "automatically exempt from Sherman Act scrutiny." *United Mine Workers v. Pennington,* 381 U.S. 657, 664 (1965).

The sweeping proposition propounded by respondents, moreover, has been definitively rejected by this Court in *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724 (1985), *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1 (1987), and *Livadas v. Bradshaw,* 114 S. Ct. 2068 (1994). These recent implied preemption decisions make it perfectly clear that the parties to a collective bargaining relationship are not relegated to a lawless arena where they must claw and fight just to win back legal protections generally available to nonunion employers and employees. Congress, in other words, never intended the NLRA to displace the "backdrop" of other generally applicable state and federal laws that apply equally to union and nonunion employment relationships. *Livadas,* 114 S. Ct. at 2081-82; *Fort Halifax,* 482 U.S. at 21; *Metropolitan Life* 471 U.S. at 757. Antitrust law is plainly part of that backdrop, as the Court held in *Radovich* and *Anderson v. Shipowners' Ass'n,* 272 U.S. 359 (1926), and as Congress affirmed during the legislative debates underlying the Norris-LaGuardia Act, *see* Pet. Br. 38-39—legislative history respondents never even mention.

In arguing for total nonintervention, respondents confuse two distinct lines of decision. First, they cite deci-

sions like *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960), and *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), *e.g.*, Resp. Br. 14, which hold that the NLRB is without statutory authority to impose employment terms and conditions on the parties or to "control the results of negotiations," 361 U.S. at 488. *See* 397 U.S. at 108. Those decisions speak to the procedural rather than substantive focus of the NLRA itself, not to the compatibility of collective bargaining with other background laws—the issue presently before the Court.

Second, they rely on *Machinists v. Wisconsin Emp. Relations Comm'n*, 427 U.S. 132 (1976), and *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986), to argue that all forms of economic self-help permitted under the labor laws, including unilateral implementation, must remain entirely free from any governmental regulation. Resp. Br. 40; Chamber Br. 12-13. But *Machinists* preemption is too narrow to support respondents' claim of immunity. These decisions hold only that the NLRA impliedly preempts state and local efforts to intercede in a specific labor dispute in a way that "directly regulate[s]" the parties' bargaining activity or that seeks "directly to force a party to forgo the use of one of its economic weapons." *Fort Halifax*, 482 U.S. at 20 (distinguishing *Machinists* and *Golden State*, both of which involved specific government action taken to handcuff an employer's or union's resort to economic weapons in a particular labor dispute). The Sherman Act is a federal statute with none of the hallmarks of such targeted, preferential intervention; rather, it is a generally applicable law that protects against unreasonable restraints of trade throughout the economy, without distinguishing between union and nonunion labor markets. *See* 482 U.S. at 20-21.

In *Fort Halifax*, the Court heard and rejected the identical argument now advanced by the NFL clubs and their *amici* concerning the supposed inviolability of the employers' resort to unilateral implementation. The Maine severance pay law at issue in *Fort Halifax* allowed employers

and employees to bargain for whatever severance pay they might choose, but in the absence of a bargaining agreement and in the event of impasse, the law prohibited employers from unilaterally providing less than the required amount of severance pay. Respondents' *amicus* the Chamber of Commerce argued in *Fort Halifax*, just as it does here, that such a requirement was preempted by the NLRA because it interfered with the "protected right of unilateral implementation" by depriving the employer of its "ability to further its bargaining position by implementing unilaterally its last, best offer." [5]

The Court disagreed that the Maine law "intrude[d] on the bargaining activities of the parties" or "undercu[t] an employer's ability to withstand a union's demand for severance pay." 482 U.S. at 20. "[I]f impasse is reached," the Court concluded, "the employer may rely on pre-existing state [common] law to justify its authority to make employment decisions," and upon impasse, "pre-existing state law [likewise] determines the right of employees to a certain level of severance pay and the duty of the employer to provide it." *Id.* at 21. *Fort Halifax* thus expressly confirms that the employer's ability to impose unilateral terms at impasse is a common law right fully subject to the ordinary application of the legal "backdrop." *Ibid.* It is perhaps no surprise then that respondents and their *amici* relegate *Fort Halifax* to passing references in footnotes, since they have no persuasive response to it. *See* Resp. Br. 42 n.29; Chamber Br. 14 n.5.[6]

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[5] Brief for Chamber of Commerce as *Amicus Curiae* in *Fort Halifax Packing Co. v. Coyne*, No. 86-341 (Oct. Term 1986), pp. 18-19 (reprinted in the appendix hereto at pages 3a-4a.)

[6] The Court in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) ("*Golden State II*"), did not hold that the NLRA grants the employer a federal right of unilateral implementation. *Golden State II* simply held that "the interest in being free of governmental regulation," to the extent such an interest is implied in the NLRA under the *Machinists* preemption doctrine, is a federal statutory right enforceable against state governments under § 1983. 493 U.S. at 112.

It is no answer to *Fort Halifax* to argue that employers must be able to impose restraints that would otherwise violate the Sherman Act in order to pressure employees to reach a bargaining agreement. Employers could even more effectively pressure employees and further their bargaining objectives upon impasse if they could unilaterally relax occupational health and safety requirements, single out particular racial groups for pay cuts, lay off the most senior employees, or reduce vested retirement benefits. But no one could reasonably maintain that the employer's interest in unilateral implementation trumps OSHA or the federal anti-discrimination and pension laws. *Metropolitan Life*, 471 U.S. at 755. Among other things, such a result would destroy the NLRA's basic premise that all employees have a free and equal right to organize for collective bargaining without thereby forfeiting legal protections they would otherwise enjoy. 29 U.S.C. § 157; *see Livadas*, 114 S. Ct. at 2075. Yet that is unavoidably where respondents' logic leads.

II. THE NONSTATUTORY EXEMPTION DOES NOT IMMUNIZE FROM ANTITRUST REVIEW RESTRAINTS ON TERMS OF EMPLOYMENT UNILATERALLY IMPOSED BY EMPLOYER CARTELS.

In achieving the required harmonization of labor and antitrust law, the guiding rule is that the Sherman Act presumptively applies except to the extent there is a clear conflict with the NLRA and its collective bargaining scheme. *See* Pet. Br. 16-17. *Accord Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, ——, slip op. at 13 (1996) ("implied repeals" require " 'irreconcilable conflict' between the two federal statutes at issue"). Under the proper application of that rule, the nonstatutory exemption immunizes restraints on terms and conditions of employment only insofar as management and labor have mutually consented to those restraints through a collective bargaining agreement. In opposing that view, respondents offer only speculative predictions that have no grounding either in law or fact.

A. Antitrust Review of Respondents' Unilaterally Imposed Salary Restraint Will Not Impede Multi-Employer Bargaining.

The NFL clubs and their *amici* predict that without automatic blanket antitrust immunity for employer associations, multi-employer bargaining in American industry will cease to exist.[7] This is crying wolf.

First, these speculations ignore completely the critical, controlling distinctions outlined earlier, *see supra* pp. 1-3, between the labor markets in professional sports and entertainment and those in more conventional industries characterized by multi-employer bargaining (including the industries represented by most of respondents' *amici*). The traditional trade unions in those other industries—in clear contrast to the Players Association in football—*are* organized "to eliminate competition in the labor market." Chamber Br. 10 (internal quotation marks omitted). Labor organizations in those industries insist on standardized wages and other terms of employment and do not delegate to individual employees the right to bargain their own contracts, since the employees stand to lose if their individual wages and other benefits are subject to competition.

Accordingly, when employer associations in such industries unilaterally implement a proposed change in terms, they are simply exchanging one set of standardized employment terms for another. As much as the employees may dislike a particular term imposed by employers, they themselves have chosen standardization over competition, and thus have no incentive (or basis) to file an antitrust challenge, as respondents appear to recognize. *See* Resp.

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[7] *See* Resp. Br. 44; Chamber Br. 9; Brief for National Elec. Contractors Ass'n as *Amicus Curiae* 17; Brief for Bituminous Coal Operators' Ass'n, *et al.*, as *Amici Curiae* 18.

Br. 17 ("In other industries, . . . an *antitrust* challenge to a unilaterally implemented wage scale would [be] almost unthinkable," since "[i]n those industries, no 'competition' interest of the kind asserted by petitioners exists") (emphasis in original). If such employees were inclined to file antitrust suits, they would have no realistic prospect for success, since they could not assert any interest in competition under the antitrust laws.[8]

In professional sports, in contrast, players' salaries had always been subject to individual negotiation prior to respondents' salary-fixing restraint, and the Players Association here specifically told the League that "no fixed wage for any group of players is acceptable to the NFLPA." J.A. 23. This case presents the best possible example of a unilateral multi-employer restraint that "contravenes antitrust policies to a degree not justified by congressional labor policy." *Connell*, 421 U.S. at 625.[9]

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[8] Where the employees have agreed to a standardized, noncompetitive labor market, the employers' unilateral implementation of terms would not "contraven[e] antitrust policies." *Connell*, 421 U.S. at 625. Employees attempting to challenge such unilateral implementation would lack antitrust standing, since their injury would not stem from a harm to competition. *See Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 545-46 (1983); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Finally, an antitrust challenge to a unilateral restraint may simply fail under the rule of reason where the employers in the industry lack the sort of monopsony power possessed by the NFL clubs.

[9] Respondents incorrectly contend that the NLRA, not the antitrust laws, is "the source of the competition interest asserted by petitioners." Resp. Br. 15; *see id.* at 15-18. The existence of individual bargaining rights for employees does *not* require employer consent secured through collective bargaining. As the players' chosen bargaining representative, only the Players Association has the prerogative to delegate bargaining authority to

Second, the speculations of respondents and their *amici* are convincingly disproven by history. For more than three decades, from *Radovich* to *Powell v. NFL*, the lower courts consistently applied antitrust review to restraints unilaterally imposed by clubs in the various professional sports leagues (other than baseball). *See* Brief for NHL Players Ass'n, *et al.*, as *Amici Curiae* 4-18. Notwithstanding the accepted application of antitrust in the sports world for many years, multi-employer bargaining in other industries was never affected or threatened. None of respondents' *amici* has suggested, nor could they, that the consent-based standard articulated 20 years ago in *Mackey v. NFL* ever prevented or impeded or even mildly disrupted the bargaining activity of employer associations in their industries.[10]

Finally, even in those industries like sports and entertainment where employees do have potential antitrust claims (because of the existence of individual bargaining), predictions that multi-employer bargaining will be destroyed ring false, since they are based on the erroneous

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the individual players. *See, e.g., Collins v. National Basketball Players Ass'n*, 850 F. Supp. 1468, 1475 (D. Colo. 1991), *aff'd*, 976 F.2d 740 (10th Cir. 1992); *Morio v. North Am. Soccer League*, 501 F. Supp. 633, 640 (S.D.N.Y.), *aff'd*, 632 F.2d 217 (2d Cir. 1980). *See also Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220, 1222 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1053 (1991). The Court has long recognized that individual bargaining is appropriate under the NLRA in industries like football, where employee talents are highly differentiated. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 336 (1944). The Sherman Act protects all such competition, regardless of how the market is created.

[10] Respondents once again pretend that "every court of appeals" has rejected a consent-based exemption. Resp. Br. 18. We have previously disposed of that misrepresentation. Reply to Opp. to Cert. 3, 4-5. *See Mackey v. NFL*, 543 F.2d 606, 612 (8th Cir. 1976) ("To determine the applicability of the nonstatutory exemption *we must first decide* whether there has been any *agreement* between the [union and the employers] concerning the [restraint at issue].") (emphasis added), *cert. dismissed*, 434 U.S. 801 (1977); *id.* at 614, 623.

premise that antitrust law will not tolerate any collective activity whatsoever by an employer bargaining unit. *See* Resp. Br. 44-45. That premise is disproven by the fact that multi-employer bargaining has continued in both professional sports and entertainment notwithstanding numerous lower court decisions applying the rule that we propose. The reason is that antitrust review of employer-imposed restraints on employment terms still allows each employer to implement its preferred terms; allows employer associations as a group to implement any number of employment restraints that are reasonable under the Sherman Act; does not condemn the formulation or presentation of bargaining positions or any other bargaining activity by employers; and does not impose any particular terms on the parties.[11]

Moreover, it is likely that many employer restraints, including those imposed by the NFL clubs, will be analyzed under the flexible rule of reason standard. *See NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 113 (1984); *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1, 8 (1979). Many challenged restraints will pass that test.[12]

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[11] The NFL clubs and *amici* warn that members of employer associations will be held liable for treble damages on a theory of "conscious parallelism" simply for attending bargaining meetings together and choosing to implement the same or similar terms if impasse is reached. *See* Resp. Br. 44-45; Brief for American Trucking Ass'ns as *Amicus Curiae* (hereinafter "American Trucking Br.") 24-25; Associated General Contractors Br. 23. Such evidence alone, however, is not enough to establish a Sherman Act § 1 violation. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). Section 1 requires proof of "a conscious commitment to a common scheme designed to achieve an unlawful objective" based on "evidence that tends to exclude the possibility of independent action." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984). Nor could employers be held liable for individually implementing after impasse terms the employers had formulated jointly prior to impasse, provided they implement such terms independently.

[12] *See, e.g., Neeld v. National Hockey League*, 594 F.2d 1297 (9th Cir. 1979); *Molinas v. National Basketball Ass'n*, 190 F. Supp.

In truth, experience powerfully demonstrates that it is the Court of Appeals' blanket antitrust exemption that would prove fundamentally disruptive to multi-employer bargaining in sports. If forced to choose between collective bargaining and the pursuit of their antitrust rights, players in the various leagues will choose to cease collective bargaining and to decertify their associations, as the NFL players have done, whenever necessary to challenge unreasonable anticompetitive restraints that the leagues would be emboldened to impose.[13]

B. Labor-Management Agreement Is the Touchstone for Antitrust Immunity for Restraints on Employment Terms.

The NFL clubs' unilateral imposition of a salary-fixing scheme foreclosing competition for developmental squad players presents the clearest possible case for denying the protections of the nonstatutory labor exemption. Antitrust review of such restraints is appropriate in the absence of employee consent expressed in a collective bargaining agreement. When management unilaterally imposes new or different terms and conditions on employees, those substantive terms are not the collective product of the parties' bargaining but are the product of the employers' own business interests in the exercise of their common law rights. *Fort Halifax*, 482 U.S. at 21.[14] There is

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241 (S.D.N.Y. 1961). As held by the District Court, respondents' salary-fixing restraint is subject to the rule of reason because of the joint venture nature of the NFL. Although *amici* speculate that the NFL may be a "single entity" for purposes of § 1, Chamber Br. 7 & n.3, respondents abandoned any such claim on appeal below. *See* J.A. 137-39.

[13] If, as respondents speculate, antitrust scrutiny ever became an impediment to multi-employer bargaining in sports or any other industry, "the orderly way to eliminate [such problems] is by legislation and not by court decision," since "[c]ongressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation." *Radovich*, 352 U.S. at 452.

[14] Although impasse may not be permanent, it is a crucial stage in the bargaining process when "the parties have exhausted the

thus no intrusion on the NLRA's bargaining process to subject restraints implemented unilaterally by employers to the legal requirements that would normally apply, including antitrust. *Ibid.* To hold otherwise would convert an implied exemption meant to foster constructive collective bargaining relationships into a blanket license for employers to circumvent the ordinary constraints of antitrust law indefinitely for their own ends. *See United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949).[15]

Since this case involves only the availability of the labor exemption for concerted employer imposition of a salary term that restrained a competitive labor market, the Court need not decide here the extent to which lockouts or any other tactical employer conduct may be exempt, as we suggested earlier. Pet. Br. 40-41. Distinguishing unilateral implementation of terms from lockouts is consistent with the Court's holding in *Fort Halifax* that background laws (like the Sherman Act) apply to terms unilaterally implemented upon impasse because such application creates no conflict with the NLRA.[16] The imposition of terms is

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prospects of concluding an agreement and further discussions would be fruitless." *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 & n.5 (1988) (internal quotation marks omitted). At impasse, the employer may implement changes in employment terms without the agreement of the employees' bargaining representative, just as any employer may do in the absence of a collective bargaining relationship.

[15] Certain *amici* suggest that employers are entitled to blanket antitrust immunity simply "by virtue of th[e] union's voluntary decision to select the multi-employer bargaining form." Chamber Br. 25. But that suggestion wrongly assumes that all anticompetitive restraints the employers may impose are "absolutely essential" to such bargaining. *Ibid.* It also assumes that by agreeing to multi-employer bargaining, the employees have implicitly surrendered their right to challenge such collusive restraints—a proposition that, if accepted, would surely chill the practice of multi-employer bargaining.

[16] The NLRB too has recognized important distinctions between unilateral implementation and lockouts. For example, employers

never purely tactical; the terms imposed always serve the employer's business interests and are always, at least potentially, a permanent substitute for a bargaining agreement.[17]

Here, of course, respondents' imposition of the fixed-salary restraint was not at all tactical. It was the culmination of the owners' decision to amend the NFL Constitution to restrain themselves from engaging in salary negotiations with developmental squad players and to provide a means to seize the payroll savings they desired. Before respondents ever met with the players' bargaining representatives, they agreed among themselves on the fixed salary that would be paid to all developmental squad players, J.A. 62, and after one short meeting, respondents declared impasse "[f]or implementation purposes." *Id.* at 19-20. This assault on competition in the market for the services of professional football players certainly cannot claim any special position in the bargaining scheme established by the NLRA and does not require protection under the implied labor exemption.[18]

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may lawfully lock out employees but cannot unilaterally implement terms prior to impasse. The NLRB has justified this distinction on the ground that a lockout is properly employed as an economic weapon to affect or respond to the negotiation process, whereas unilateral implementation (while seemingly less drastic) forecloses negotiation. *See Daily News of Los Angeles*, 315 N.L.R.B. 1236, 1243 (1994), *enf'd*, 73 F.3d 406 (D.C. Cir. 1996).

[17] The NLRB has certainly never said otherwise. Respondents and their *amici* heavily rely upon *Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22, 23 (1973), *enf. denied*, 500 F.2d 181 (5th Cir. 1974), but there the NLRB observed only that impasse need not be permanent and that actions taken upon impasse may sometimes break a stalemate.

[18] Because the exemption for employment terms that restrain a competitive labor market is properly limited to those terms incorporated into bargaining agreements, any immunity for such restraints should end when the agreement has expired and the employees have notified the employers they no longer consent to the restraint. *See* Pet. Br. 45-47; *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 199 (1991). Such termination of the exemption would

III. ANTITRUST LAW FULLY APPLIES TO EMPLOYER RESTRAINTS ON COMPETITION IN LABOR MARKETS, AS EVERY COURT TO ADDRESS THE ISSUE HAS HELD.

Finally, respondents attempt an end run around the nonstatutory labor exemption (and hence the question on which the Court granted certiorari). The NFL clubs claim that regardless of any purported conflict with labor law, the Sherman Act can never apply to any collusive restraint on competition in an input market for labor, unless the restraint also directly harms competition in an output or "product" market. Resp. Br. 18-26. It is a powerful indictment of the panel majority's reasoning that respondents would stretch to defend the judgment below on the basis of an alternative theory unanimously rejected by the Court of Appeals, *see* Pet. App. 24a (majority), 35a-41a (dissent), and disclaimed even now by respondents' own *amici*.[19] One virtue of the argument from respondents' point of view, of course, is that it avoids any need to justify the majority's startling conclusion that employees who "seek the protections of the Sherman Act" must "forego unionization or . . . decertify their unions." Pet. App. 30a—something the football players have already had to do. But in substance it is an audacious claim completely lacking in merit and one thoroughly discredited in the courts and by leading antitrust scholars.

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not implicitly overrule *NLRB v. Katz*, 369 U.S. 736 (1962). *See* Chamber Br. 27-28. The NLRB has never held that employers violate the *Katz* impasse doctrine by unilaterally altering terms the employees, through their bargaining representative, have declared they no longer wish to maintain. In any event, impasse is the latest possible point for terminating the exemption, and the Court should emphatically reject the rule of never-ending immunity adopted in *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

[19] *See* American Trucking Br. 29 n.12 (where the nonstatutory labor exemption is inapplicable, "the Sherman Act remains in full force"); Chamber Br. 25 ("Any claim to a[n antitrust] exemption would evaporate if the union chose not to bargain [collectively].").

This Court has long held that antitrust law fully applies to competition in markets for the services of individuals. *E.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975) ("The sale of services" is "specifically included . . . within § 1.") (citing *Radovich*). *See also FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990). The Court has also made it clear the Sherman Act "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers," but protects *all* participants in competitive markets "who are made victims of the forbidden practices." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982) (quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)); *see Radovich*, 352 U.S. at 454. Respondents' radically narrow construction of the antitrust laws runs hard against the current of these prior decisions.

Significantly, the NFL and several of the respondent clubs made the same argument to this Court 40 years ago in *Radovich*, and the Court rejected it. Relying heavily on the tenuous authority offered here—the cryptic preamble sentence to § 6 of the Clayton Act, 15 U.S.C. § 17,[20] and dicta in *Apex Hosiery Co. v. Leader*, 310

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[20] Section 6, like other provisions of the so-called statutory labor exemption, protects only the unilateral conduct of *employee* organizations. Thus, "a party seeking refuge in the statutory exemption must be a bona fide labor organization." *H.A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 717 n.20 (1981). *See id.* at 717 n.21 ("employers . . . are plainly a 'non-labor group' "); *Connell Construction*, 421 U.S. at 621-22; *United States v. Hutcheson*, 312 U.S. 219, 232 (1941). Far from "plain language" supporting respondents, Resp. Br. 22, the single preamble sentence of § 6 is fully consistent with this narrow interpretation, *see Mackey v. NFL*, 543 F.2d at 617-18; *Cordova v. Bache & Co.*, 321 F. Supp. 600, 606 (S.D.N.Y. 1970), and the statute's legislative history confirms that Congress intended no more. *See* Lee Goldman, *The Labor Exemption to the Antitrust Laws as Applied to Employers' Labor Market Restraints in Sports and Non-Sports Markets*, 1989 Utah L. Rev. 617, 641-46.

U.S. 469 (1940)[21]—respondents argued in *Radovich* that controversies between employees and employers concerning "restraints [on] employee services" (there, the reserve clause in NFL player contracts) are "exemp[t] . . . from the operation of the Sherman Act." Brief for Respondents in *Radovich v. NFL*, No. 56-94 (Oct. Term 1956), p. 61 (reprinted in the appendix hereto at page 9a). The Court summarily turned away that contention as "lacking in merit." 352 U.S. at 454.

In an effort to distinguish *Radovich*, respondents argue that since the reserve clause at issue there restrained players from, among other things, working for a competing league, "there can be no doubt" the Court's holding turned on the presence of "adverse effects on the product market." Resp. Br. 25. In *Radovich* itself, however, the NFL made precisely the opposite assertion,[22] and nothing in the Court's discussion of Radovich's antitrust claim addressed any effects of the challenged restraint beyond its effects in the labor market of the NFL. *See* 352 U.S. at 453-54. The Court, furthermore, held that it would "not add requirements to burden the private [antitrust] litigant beyond what is specifically set forth by Congress." Id. at 454.[23]

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[21] *Apex Hosiery*, which stemmed from a sit-down strike by employees, held only that "restraints on the *sale* of the employee's services to the employer, however much they curtail the competition among *employees*, are not in themselves" violations of the Sherman Act. 310 U.S. at 502-03 (emphasis added). The Court did not hold that unilateral restraints on commercial competition among *employers* for the *purchase* of employee services are beyond the reach of the Act.

[22] *See* NFL Br. in *Radovich* 59 (app. 8a) ("Nothing is alleged from which it can be inferred that restrictions upon the employment of Radovich decreased the quantity or quality of professional football games or caused any increase in prices to be charged to the public for admissions to games.").

[23] It would be curious, moreover, if the NFL clubs now had a free hand to engage in collusive restraints that financially injure players simply because the NFL since *Radovich* has unlawfully

Respondents cite language in *Apex* suggesting that the Sherman Act cares only about restraints that tend to restrict production, raise prices or otherwise harm consumers. Resp. Br. 19-20; *see* 310 U.S. at 493. But even if so, monopsonistic collusion like respondents' salary-fixing scheme is condemned under the antitrust laws precisely because it *will* eventually harm consumers by restricting production of valuable inputs and degrading the quality of the ultimate product. *See Mandeville Island Farms*, 334 U.S. at 240-43.[24]

In the decades since *Radovich*, the NFL clubs (and assorted other professional sports leagues and employers) have repeatedly peddled the labor market/product market distinction to numerous courts, all of which have turned it down.[25] The nation's leading antitrust authorities, too, have rejected respondents' radically limited interpretation of the antitrust laws. *E.g.*, 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 377c (rev. ed. 1995):

> "Antitrust law addresses employer conspiracies controlling employment terms precisely because they

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monopolized the market for professional football through the elimination of all competing leagues. *See supra* note 1.

[24] *See also supra* note 2. Contrary to respondents' assertions, petitioners have never conceded that respondents' collusion would have no effect on the NFL's football product and thus on consumers. Counsel for petitioners stated to the court below only what is obvious—that it is specious to claim the clubs' $1,000 per week salary-fixing arrangement had *"improved"* the quality of football. Pet. App. 30a n.8 (emphasis added).

[25] *See Powell v. NFL*, 930 F.2d at 1298-99 & n.4; *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183-89 (D.C. Cir. 1978); *Mackey v. NFL*, 543 F.2d at 616-18 (discussing cases); Pet. App. 37a-38a (Wald, J., dissenting). Indeed, the lower courts have consistently recognized that restraints operating exclusively in labor markets are within the reach of the antitrust laws. *E.g., Gardella v. Chandler*, 172 F.2d 402, 407-08 (2d Cir. 1949) (L. Hand, J., concurring); *Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 544 (10th Cir. 1995). *See also Law v. NCAA*, 902 F. Supp. 1394, 1402, 1405 & n.11 (D. Kan. 1995) (holding that collegiate athletic association rule fixing salaries for coaches violates § 1).

> tamper with the employment market and thereby impair the opportunities of those who sell their services there. Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services. It would be perverse indeed to hold that the very object of the law's solicitude and the persons most directly concerned—perhaps the only persons concerned—could not challenge the restraint." [26]

Respondents simply rehash tired arguments that provide no basis for the Court to repudiate this consensus of authority or jettison so many of its prior holdings.

CONCLUSION

For the foregoing reasons, and those stated in petitioners' opening brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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March 1996

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[26] While holding in *Associated Gen. Contractors* that a labor organization itself may not have antitrust standing to challenge an employer's labor market restraint, the Court confirmed that those persons who are "market participant[s]" and "direct victim[s]" of the restraint certainly *would* "have a right to maintain their own [Sherman Act] actions." 459 U.S. at 541.

APPENDICES

APPENDICES

APPENDIX A

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

FORT HALIFAX PACKING COMPANY, INC.,
Appellant,

—against—

P. DANIEL COYNE, Director, Bureau of Labor Standards, Department of Labor,
Appellee.

On Appeal from the Maine Supreme Judicial Court

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

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* * * *

[page 17]

B. The Maine Severance Pay Law Is Preempted Under the "Free Play" Doctrine.

1. The Severance Pay Law Impermissibly Intrudes Into the Bargaining Process.

The process of collective bargaining is the primary concern of the NLRA. *Metropolitan*, 105 S.Ct. at 2395, 2396. *See also New York Telephone Company* v. *New York State Department of Labor*, 440 U.S. at 551 (Powell, J., dissenting). As envisioned by Congress, bargaining must occur in an atmosphere of equality. *Metropolitan*, 105 S.Ct. at 2395; *Golden State Transit Corporation* v. *City of Los Angeles*, 106 S.Ct. at 1400. A state cannot " 'add to an employer's federal legal obligations in collective bargaining' any more than in the case of employees." *Machinists*, 427 U.S. at 147.

The Maine Severance Pay Law prevents the process of collective bargaining from operating with the balance and equality decreed by Congress. Severance pay is a mandatory subject of bargaining. *See NLRB* v. *Royal Plating & Polishing Co.*, 350 F.2d 191, 196 (3d Cir. 1965); *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 678, n.15 (1981). Indeed, in negotiations triggered by an employer's decision to terminate or relocate its operation, severance pay is often the crucial issue. The union typically proposes a high amount of severance; the employer counters with a lower amount or even zero. In the framework of unfettered collective bargaining under the NLRA, each party is then free to wrest concessions in exchange for its agreement to the other's proposal, to insist on its own proposal, or to refuse to agree at all. In the absence of intrusive state regulation, bargaining proceeds as Congress intended: between parties who are equally positioned, are under no compulsion to agree to the other's demands, and are free to use the full panoply of economic weapons at their disposal to achieve voluntary agreement. *Golden State Transit Corporation*

v. *City of Los Angeles*, 106 S.Ct. at 1400; *First National Maintenance Corp.* v. *NLRB*, 452 U.S. at 670.

[page 18] An employer subject to the Maine Severance Pay Law has no equality of bargaining position. The employer comes to the bargaining table needing an express agreement on severance pay to escape the substantial payment otherwise required by the Severance Pay Law. The union has no incentive to enter into such an agreement or to make concessions to achieve its own position on severance pay, since in the absence of an express agreement, severance liability will nevertheless be imposed on the employer. The Severance Pay Law gives the union a bargaining chip which inevitably tilts negotiations on severance pay in favor of the union. The effect is to undo the Congressional decision to send the parties to the bargaining table with equivalent power.

In levying economic consequences on the employer for failing to achieve an express contract, the State is attempting both to aid the party which the State judges to be the weaker and to impose its own solution to the parties' bargaining stand-off. This Court has consistently held that state action which has this effect is preempted. "Even though agreement is sometimes impossible, the government may not step in and become a party to the negotiations." *Golden State Transit*, 106 S.Ct. at 1401. Not even the NLRB, with its broad remedial authority, can compel either party to reach agreement on a mandatory subject or burden one side more than the other for the failure to agree after good faith bargaining. *H.K. Porter and Co.* v. *NLRB*, 397 U.S. 99 (1970). Maine may not attempt to achieve the same result.

2. The Severance Pay Law Deprives the Employer From Resorting to the Legitimate Weapon of Unilaterally Implementing Its Last, Best Offer on Severance Pay.

In addition to tipping the balance of power in actual negotiations, the Severance Pay Law interferes with the employer's ability to further its bargaining position by

implementing unilaterally its last, best offer after a bargaining impasse has been reached. Unilateral implementation is a legitimate economic [page 19] weapon under the NLRA, just as is a strike or lock-out. *NLRB* v. *Katz*, 369 U.S. 736 (1962); *Reed & Prince Mfg. Co.* v. *NLRB*, 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953). The State may not impede its use any more than it could prohibit peaceful recognitional picketing, *Garner* v. *Teamsters Union*, 346 U.S. 485 (1953), a secondary boycott, *Teamsters* v. *Morton*, 337 U.S. 252, or a concerted refusal to work overtime, *Machinists*, 427 U.S. 132. Nor may the State restrict an employer's weapons more than a union's. *Golden State Transit*, 106 S.Ct. at 1401.

Applying the employer's protected right of unilateral implementation to the facts at issue here, an employer whose last bargaining offer is for zero severance pay could, at impasse and in the absence of an express contract, implement its no severance pay offer. Like other employer self-help measures, the economic pressure generated by unilateral implementation would be an incentive to the union to return to the bargaining table, to curtail its own economic weapons, or to make other concessions.

Yet a Maine employer subject to the Severance Pay Law can wield no economic pressure by unilateral implementation of its severance pay offer. Without an express contract, the employer is subject to severance pay liability. The Severance Pay Law effectively eliminates this federally-sanctioned weapon from the employer's economic arsenal.[13] Under this Court's consistent decisions

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[13] Appellant interprets the Severance Pay Law to permit an employer to establish an express contract for severance pay by unilateral declaration. Jurisdictional Statement at 12. If this view is correct, the Severance Pay Law encourages collective bargaining and operates unequally on unionized and non-unionized employees. A unionized employer may not act unilaterally under the NLRA; a non-unionized employer would have no constraint. A state law that encourages collective bargaining, or that penalizes an employee's right to refrain from union activities, is invalid. *Metropolitan Life Insurance Company v. Massachusetts*, 105 S.Ct. at 2398.

protecting the free use of economic weapons by either [page 20] party to enhance its bargaining position, and rejecting state attempts to limit those economic weapons, the Maine Severance Pay Law is preempted.

C. The Maine Severance Pay Law is Not Protected under Metropolitan Life Insurance Company v. Massachusetts.

Metropolitan Life Insurance Company v. *Massachusetts*, 105 S.Ct. 2380, does not control this case, except as it affirms that equality of bargaining power is the centerpiece of the NLRA.

The issue in *Metropolitan* was a narrow one: whether a state insurance regulation that does not alter the balance of bargaining is the kind of interference with the goals of federal labor law which is forbidden by the NLRA. The dispositive difference between *Metropolitan* and this case is that the Severance Pay Law indisputably tips the balance of bargaining. Unlike the Massachusetts statute, which leaves the parties free to purchase the benefit or not, *Metropolitan*, 105 S.Ct. at 2394, the Severance Pay Law gives the employer no choice. The failure to negotiate an express contract for severance pay subjects the employer to payment by law. By compelling agreement on a critical bargaining term, Maine has acted more like Los Angeles in *Golden State Transit*, 106 S.Ct. 1395, than like Massachusetts in *Metropolitan*.

In further distinction from the regulation at issue in *Metropolitan*, the Severance Pay Law does not mandate any minimum benefit. The Severance Pay Law applies only to large employers and to certain categories of employees. It permits a covered employer to make any severance pay contract whatsoever with covered employees or their bargaining representatives, arguably even for zero severance benefits. Indeed, the Severance Pay Law does not require uniform or minimum severance benefits even among covered employees in the same establishment.

[page 21] Rather than setting a "specific minimum protection" for individual workers, *Metropolitan*, 105 S.Ct. at 2397, quoting *Barrentine* v. *Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728, 739 (1981), the Severance Pay Law attempts to set the method by which covered employers and employees reach accommodation on the issue of severance pay during a plant closing. The method which the State favors—an express contract between employers and employees—is incompatible with the process of free collective bargaining chosen by Congress to accommodate the parties' interests on the same subject. The Severance Pay Law affects not only the result but the very process of bargaining, which this Court affirmed in *Metropolitan* is the foundation of federal labor law.

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APPENDIX B

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 94

WILLIAM RADOVICH,
Petitioner,
v.
NATIONAL FOOTBALL LEAGUE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS NATIONAL FOOTBALL LEAGUE, CHICAGO CARDINALS FOOTBALL CLUB, INC., NEW YORK GIANTS FOOTBALL CLUB, INC., CHICAGO BEARS FOOTBALL CLUB, INC., DETROIT FOOTBALL COMPANY AND LOS ANGELES RAMS FOOTBALL CLUB

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* * * *

[page 56]

(2) The Complaint Fails to Allege Injury to the Public

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[page 59]

Plaintiff alleges only that by virtue of the adoption and enforcement of a uniform player's contract, and because of his own breach of it, he could not obtain engagement in the National Football League, or its "Division." Those allegations, if proved, would fail to establish a substantial injury or indeed any injury to the public. Nothing is alleged from which it can be inferred that restrictions upon the employment of Radovich decreased the quantity or quality of professional football games or caused any increase in prices to be charged to the public for admissions to games.

(3) The Clayton and Norris-LaGuardia Acts Specifically Exempt From the Antitrust Laws, Plaintiff's Claim for Relief Set Out in the Complaint

Plaintiff claims that defendants by agreement contained in the uniform player's contract have refused to employ him in their professional football league. A refusal by [page 60] employers, whether singly or in concert, to employ any party to a labor dispute is declared by the Clayton and the Norris-LaGuardia Acts (29 U.S.C. § 52; 29 U.S.C. §§ 101-15) not to be considered or held to be in violation of any law of the United States. Hence, the complaint is fatally defective.

The allegations of the complaint reveal nothing more than a controversy between the employee and his employer and their association concerning terms and conditions of employment. Radovich alleges that he was under contract to the Detroit Lions; that he committed a breach of his contract; that he was placed on the ineligible list, and that by agreement, the ten member football clubs of

the National League refused to allow him to play in the National League, or its "Division".

* * * *

[page 61]

It is declared, in Section 6 of the Clayton Act:

> "The labor of a human being is not a commodity or article of commerce. . . ." (15 U.S.C. § 17)

That this section exempts restraints regarding employee services from the operation of the Sherman Act has been expressly held by this Court in the *Apex Hosiery* case, wherein the Court said:

> "A combination of employees necessarily restrains competition among themselves in the sale of their services to the employer; yet such a combination was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a 'restraint of trade.' Since the enactment of the declaration of § 6 of the Clayton Act, 15 U.S.C. § 17, that '*the labor of a human being is not a commodity or article of commerce* . . . nor shall such [labor] organizations or the members thereof he held or construed to be illegal combinations or conspiracies in restraint of trade under the Anti-Trust laws,' it would seem plain *that restraints on the sale of the* [page 62] *employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.*" (emphasis supplied)
>
> *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 502-503

That this principle laid down in the *Apex Hosiery* case is equally applicable to agreements of employers

and employers' associations and to disputes between employers and an employee is clear from the language both of Section 20 of the Clayton Act and the history and provisions of the Norris-LaGuardia Act.

* * * *

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No. 95-388

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, JAMES BISHOP; JOHN BUDDENBERG; GARY COUCH; CRAIG DAVIS; RICKY ANDREWS, THOM KAUMEYER, WESLEY PRITCHETT, and JOHN SIMPSON, Individually and on behalf of all class members,

Petitioners,

vs.

PRO FOOTBALL, INC. d/b/a WASHINGTON REDSKINS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF THE SCREEN ACTORS GUILD, INC., AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, DIRECTORS GUILD OF AMERICA AND WRITERS GUILD OF AMERICA FOR LEAVE TO FILE BRIEF AMICI CURIAE and BRIEF OF AMICI CURIAE

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MOTION OF THE SCREEN ACTORS GUILD, INC., THE AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, DIRECTORS GUILD OF AMERICA AND WRITERS GUILD OF AMERICA FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 37.4 of the Rules of this Court, the Screen Actors Guild, Inc. ("SAG"), American Federation of Television and Radio Artists ("AFTRA"), Directors Guild of America ("DGA") and Writers Guild of America ("WGA"), hereby move for leave to file the attached brief amici curiae. Petitioners have granted but Respondents have refused consent for SAG, AFTRA, DGA and WGA to file their brief amici curiae in this case.[1]

The question of the existence and content of a new nonstatutory exemption from the antitrust laws is a crucial issue in antitrust and labor law today. The interests of SAG and AFTRA, the unions representing performers employed in the production of theatrical motion pictures, television and radio programs, and television and radio commercials, DGA, the union representing directors employed in such productions, and WGA, the union representing writers employed in such productions, as amici, flow from the signal importance that the decision below has to employees in the entertainment industry. As principal representatives of large bargaining units dealing with multi-employer groups, SAG, AFTRA, DGA and WGA have a broad and important perspective on the issue to be presented to the Court in this case.

The Circuit Court's decision--if allowed to stand--will invite employer collusion and have devastating effects on labor relations throughout the entertainment industry, consequences likely to exceed substantially those which will ensue in the world of sports.

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[1] Attached hereto is the written consent of the Petitioners to the submission of this brief.

The Petition for Certiorari as well as the Amicus Curiae filings of the United States in support of the Petition, in support of the petition for rehearing in the Court of Appeals (Petition, App. E), and in *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), each correctly observe that the consequences of the Court of Appeals' decision will not be specific to sports but will extend to other areas of the economy, particularly entertainment. Because of their particular perspective, SAG, AFTRA, DGA and WGA can elaborate on: the structure of labor relations in the entertainment industry; historical instances of the inclination of entertainment enterprises to collude in their markets for talent; and the manner in which such collusion would most likely be fostered by the Court of Appeals' decision in *Brown*.

Because of their particular perspective, their interest in a just resolution of the case, and the singular importance of the issue presented, SAG, AFTRA, DGA and WGA request leave to file the attached brief as amici curiae.

Respectfully submitted,

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January 19, 1996

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No. 95-388

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OCTOBER TERM, 1995

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Petitioners,

vs.

PRO FOOTBALL, INC. d/b/a WASHINGTON REDSKINS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICI CURIAE THE SCREEN ACTORS GUILD, INC., THE AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, DIRECTORS GUILD OF AMERICA AND WRITERS GUILD OF AMERICA

This Brief, in support of Petitioners Antony Brown, *et al.*, is submitted in accordance with Rule 37 of the Rules of this Court. The Screen Actors Guild, Inc. ("SAG"), American Federation of Radio and Television Artists ("AFTRA"), Directors Guild of America ("DGA") and Writers Guild of America ("WGA") have obtained and file herewith the written consent of the Petitioners to the submission of this brief. Respondents, however, have refused consent. Accordingly, pursuant to Rule 37.4 of the Rules of this Court, SAG, AFTRA, DGA and WGA are filing herewith a motion for leave to file this brief as amici curiae.

INTEREST OF AMICI CURIAE

The question of the existence and content of a new nonstatutory exemption from the antitrust laws is a crucial issue in antitrust and labor law today. The interests of SAG and AFTRA, the unions representing performers employed in the production of theatrical motion pictures, television and radio programs, and television and radio commercials, DGA, the union representing directors employed in such productions, and WGA, the union representing writers employed in such productions, as *amici*, flow from the signal importance that the decision below has to employees in the entertainment industry. As principal representatives of large bargaining units dealing with employers engaged in coalition bargaining, SAG, AFTRA, DGA and WGA have a broad and important perspective on the issue of the proper scope of the nonstatutory labor exemption.

ARGUMENT

I. THE COURT OF APPEALS' DECISION WILL FOSTER COLLUSION AMONG CONGLOMERATE ENTERTAINMENT EMPLOYERS WITH DEVASTATING CONSEQUENCES FOR LABOR RELATIONS IN THE ENTERTAINMENT INDUSTRY

The Petitioners have persuasively delineated the profoundly harmful consequences for labor relations in professional sports which have already ensued from the decision in *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), and which will be compounded immeasurably by the decision of the Court of Appeals in this case. Petition, at 26 *et. seq*. Petitioners correctly observed that the effects of these decisions are not specific to sports but extend to other industries that rely on a combination of multi-employer bargaining and individual performer negotiations, most notably the entertainment industry. Petition at 26. In its *amicus curiae* brief in support of the Petition in this case, the United States observed that the decision's "potential for mischief" extended, in particular, to the "entertainment industry generally, which has an economic structure similar to professional sports, characterized by multi-employer bargaining units." Brief for United States as Amicus Curiae in support of Petition at 12. Based on perspectives gained through their direct experience representing employees in the primary areas of the entertainment industry, *amici* can readily confirm that the observations of Petitioners and the United States are well-founded.

As in professional sports, the Circuit Court's decision will discourage resolution of labor disputes in the entertainment industry through collective bargaining agreements. First, it is likely to lead to more strikes and lockouts. For entertainment employers, it will create powerful new incentives to use their multi-employer associations as a mechanism for unilaterally and collectively imposing employment terms that severely

restrain competition in their markets for performers, writers, directors and other employees without fear of antitrust violations. For Talent unions, the only recourse would be to strike, which might be ineffective. Strikes, whether or not they are effective, nevertheless, create labor unrest and disrupt the economies of numerous communities.

The harmful consequences of such disruption will be felt, not only by the employees themselves, but by innumerable people who rely for their livelihoods directly and indirectly on the entertainment industry. The Circuit Court's decision--if allowed to stand--will have devastating effects likely to exceed substantially those which will ensue in the world of sports. This is primarily because the entertainment industry, both in terms of numbers of employees and in terms of revenue, is so much larger than professional sports. Whereas professional sports accounts for roughly $5 billion in spectator revenues annually, entertainment (even narrowly defined as spectator entertainment including, *e.g.* film-making, broadcasting, music, live theater, and other artistic performances) accounts for some $100 billion annually.[1] Since 1990, the motion picture industry alone has created more jobs than all of America's motor vehicles and parts manufacturers, pharmaceutical companies, and the hotel industry combined.[2]

The entertainment industry, like the sports industry, is the province of employer conglomerates. There are now four major television networks, six major recording companies, seven major film studios, and eight large book publishers. While there are small, independent firms engaged in producing movies and other entertainment products, more and more of the majors are being welded together into giant multimedia

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[1] *See*, Harold Vogel, *Entertainment Industry Economics* Cambridge University Press (3rd Ed. 1994).

[2] James Aley, *Where the Jobs Are; The U.S. has Added Millions Since 1990--Some in Surprising Places. Look For the Best Ones in Industries where Knowledge Counts, The Time Inc. Magazine Co. Fortune*, Sept. 18, 1995, at 53.

conglomerates, *e.g.* Paramount-Viacom, Fox, Time-Warner, Disney-ABC, which dwarf the National Football League.

Entertainers comprise one of the most extensively unionized occupations in the entire private sector of the American economy. Industry-wide bargaining is virtually universal in most segments of the entertainment industry. Though the key arms of entertainer unionism emerged before the 1935 enactment of the National Labor Relations Act, the NLRA brought about the recognition of the entertainment unions by entertainment employers and governs labor relations in the entertainment industry. Until now, the premise of federal labor legislation has been that employees have a better chance of securing a fair deal from their employers if they bargain collectively rather than individually. The holding that employees lose the right to sell their talents in a competitive market merely by exercising the right to pursue collective bargaining--even after bargaining ends in failure--totally undermines this premise for employees in the entertainment industry.

The structure of labor relations in entertainment closely parallels that in sports. In both contexts, (1) the work force is heavily unionized; (2) industry-wide bargaining is almost universal; and (3) the employers in the entertainment industry collectively wield monopsony power.

Additionally, the entertainment and sports industries are the two areas of the economy where the accepted industry practice is for the collective bargaining agreement to prescribe only a minimum framework of employment terms; because of the vast differences in the available roles for performers and in the skill required to fill such roles (i.e., star performers, featured performers, principal performers, and extras), compensation terms for highly-skilled performers are typically established in these industries through individual negotiations in which employees are routinely represented by "agents." *See H.A. Artists v. Actors' Equity Ass'n*, 451 U.S. 704, 707 (1981). Individual writers and directors also routinely negotiate "overscale compensation" rates which exceed the minimums

in the collective bargaining agreements negotiated by their respective unions.

Management collusion in these individual negotiations can produce huge economic gains for the employers and cause employees to suffer substantial economic harm. To maximize profits, employers will obviously be tempted to restrain competition through collusion in the talent market, if they can do so with antitrust immunity. Entertainment employers have been deterred based on the prevailing understanding that, apart from union agreements, joint action in implementing such terms would be subject to challenge under the antitrust laws. The Court of Appeals' decision will enable conglomerate employers in the entertainment industry to act outside of union agreements in imposing onerous employment terms which would substantially eliminate competition in their talent markets. Because the entertainment industry is many times larger than the sports industry, the potential for monopsony gains realizable through collusion is far larger as well.

II. HISTORY REFLECTS THE INCLINATION OF CONGLOMERATE ENTERTAINMENT EMPLOYERS TO ESTABLISH INDUSTRY-WIDE PRACTICES IN RESTRAINT OF COMPETITION IN THEIR MARKETS FOR ARTISTIC TALENT

The history of labor relations in the entertainment industry provides tangible illustrations of the willingness of entertainment employers to establish industry-wide practices. Circumstances surrounding the birth of the Screen Actors Guild and other entertainment unions in the 1930's provide a leading example. During the Depression, the movie studios agreed among themselves through their own organization, the Motion Picture Producers and Distributors Association, to institute a temporary 50 percent salary cut in current salary rates; a salary cap of $100,000 a year on the amount that could be paid to any performer; and a "right of first refusal" on any offers made to their contract players once the seven-year terms

of their contracts expired. The prospect of such a change in studio-performer relations galvanized organization of the Screen Actors Guild as an independent union.[3]

Assuming that such terms could otherwise be attacked under the antitrust laws, Hollywood in fact sought--and ultimately could not secure--approval from President Franklin Roosevelt pursuant to the National Industrial Recovery Act. Nor has the entertainment industry in the years since assumed that unconsented restraints of the market for employee talent would be immune from antitrust scrutiny. The Screen Actors Guild and other entertainment industry unions have, until now, succeeded--by withholding their agreement--in blocking introduction of industry-wide salary caps, rights of first refusal and other similar employment terms which would hinder individual performers, screenwriters and directors from realizing the full economic returns on their talents, experience, and previous success in the market place.

A salient example of what is likely to occur if the Court of Appeals' decision is allowed to stand involves the net profit formula, a standard component of movie-studio contracts with certain overscale actors and with other overscale creative talent such as authors, screenwriters, directors, producers, etc.[4]

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[3] Another example is the Waldorf-Astoria Agreement of the members of the Motion Picture Association of America ("MPAA") in 1947 not to hire anyone who declined to disavow communist associations. The agreement, a classic group boycott, imposed a fifteen-year blacklist on many leading screenwriters of the time. The scheme could not plausibly have been effectuated other than through collective action of all members of the group. (The recent decision by the Second Circuit cited the *Brown* decision as support to immunize from antitrust challenge an agreement among sports clubs to blacklist a particular employee. *Caldwell v. American Basketball Ass'n*, 66 F.3d 512 (2d Cir. 1995)).

[4] In contrast to a limited group of stars who command a percentage of gross revenues, most performers are relegated to a contingent share of *net* profits. Studio-devised net profit formulae employ a "rolling break even point" which is constantly pushed back as the studio deducts from incoming film revenues an elaborate set of distribution fees, promotional expenses, studio and advertising overhead, interest charges and the like.

Under these formulae, the prospect of actually enjoying a share of net profits is generally illusory.[5]

The detrimental implications of the Court of Appeals decision are highlighted by suggestions of collusion--albeit covert collusion--in the legal challenges to the net profit formula, mounted against individual studios by James Garner and Art Buchwald.[6] The trial court in the *Buchwald* case, however, noted the movie industry's oligopolistic character and cited evidence suggestive of collusion among the movie studios with respect to the net profit formula.[7] The court cited

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[5] At the end of 1994, the movie *Forrest Gump* had reported revenues of $350 million of which its studio, Paramount, had received $190 million. Though production costs were $45 to $50 million, Paramount's books showed that *Gump* remained $60 million in the red. Creative talent associated with the movie--including the author of the book, the film's screenwriter and the co-producers--had all signed standard contracts under which their contingent compensation was tied to net profits as defined by Paramount's formula.

[6] In 1983, James Garner sued Universal City Studios because he had not received a penny of the 37.5 percent of net profits he was supposed to get for starring in *The Rockford Files* for which he had taken less than his normal salary rate. By 1988, when the series had earned $120 million in network and syndication fees, Universal's books still showed the series in the red based on various charges against revenues above and beyond production costs. The suit was eventually settled for a reported $10 million payment by Universal to Garner.

Writer Art Buchwald and producer Alain Bernheim sued Paramount when they received no contingent compensation payments for the movie *Coming to America*, which they allege was based on Buchwald's ideas. A California court determined in 1990 that the standard form contract utilized by Paramount was a contract of adhesion and that seven distinct aspects of the net profit formula were unconscionable. *Art Buchwald v. Paramount Pictures*, No. C706083 (Sup. Ct. of Calif., Cty. of Los Angeles)(1990). The unpublished decision of December 21, 1990 appears as an appendix in P. O'Donnell and D. McDougal, *Fatal Subtraction* at 541 (Doubleday 1992). The parties settled the case before Paramount's appeal was decided.

[7] More recently, the Estate of Jim Garrison filed suit charging that the seven major studios, whose films account for ninety percent of box-office revenues, had conspired to develop and adhere to the net profits formula.

(Footnote continued)

evidence that the Paramount contract was standard in the industry and, moreover, that when one studio revises a provision of its net profit formula, that revision is adopted by the other studios.[8]

The Court of Appeals' decision, if allowed to stand, would be welcomed by the movie industry as a blank check to jointly implement ever more onerous net profit formulations as employment terms of union-represented employees.[9] The logic of the Court of Appeals' decision, combined with that of *Flood v. Kuhn*, 407 U.S. 258, 284 (1972)("state antitrust regulation would conflict with federal policy"), would be

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Estate of Garrison v. Warner Bros., Inc. et al., No. BC139282 (Sup. Ct. of Calif., Cty. of Los Angeles). Garrison, the late New Orleans district attorney who conducted a decades-long investigation to try to uncover a conspiracy behind the 1963 assassination of President John F. Kennedy, wrote a book-length account of his crusade, *On the Trail of the Assassins*, which co-writer/director Oliver Stone and Warner Bros. used as a basis for the movie, *JFK*. Garrison was promised a share of the net profits; the film, which grossed some $200 million at the box office, generated no net profits under Paramount's net profit clause. In addition to contract law claims of unconscionability and lack of good faith and fair dealing, the suit--filed in California state court in November 1995--charges *covert* price fixing and boycotts in violation of California's Business and Professions Act.

[8] P. O'Donnell and D. McDougal at 543.

[9] Gray areas among "employees", "contractors" and "supervisors" invite abuse. Historically, entertainment employers have characterized contingent workers as contractors rather than employees; under the Court of Appeals' decision, they will find advantage in characterizing contingent workers as employees to the extent possible. The Garrison estate was plainly a "contractor" in conveying rights to a book. On the other hand, James Garner was clearly an employee who would be subject to the non-statutory labor exemption were the Court of Appeals' decision to stand. Other categories of workers susceptible to categorization as either contractors or employees or performing a combination of supervisory and nonsupervisory functions may be subsumed within union-represented units of employees. There is no logic for allowing antitrust recourse to some contingent workers and denying it to others based merely on whether they are judged to be "contractors", "supervisors" or "employees".

hailed by entertainment employers as precluding antitrust challenges under state as well as federal law.

The movie studios would be similarly inclined to collude with respect to the sharing of gross profits, now a key feature of star performers' compensation.[10] The Court of Appeals' decision would provide producers with a vehicle for imposing an industry-wide cap on shares of gross profits payable to talent free of possible antitrust liability. The gains to the movie studios from such a device would dwarf the roughly $12 million apparently saved by the NFL Clubs through the Developmental Squad salary fix at issue in *Brown*.

Another example is the matter of residual rights, the talent's share of the revenues derived by the movie studio or other producer when the film or television product is reused in a setting other than the one for which it was originally produced. The emergence of new technologies, beginning with television and now including video, cable, interactive multimedia, and also the sale by the studio of foreign rights continue to increase the dollar value of residual rights. As a consequence, the size of the talent's share in the value of residual rights has been the most contentious issue in Hollywood labor relations for decades and it remains so today. Notably, the right to share in TV residual revenues was first won for film actors by the SAG through a lengthy strike in 1960 led by former President Ronald Reagan when he was president of the SAG, and the same year for screenwriters in their strike. The Court of Appeals' decision would allow the movie studios collectively, without fear of antitrust liability, upon expiration of collective bargaining agreements, to limit or eliminate the share of residual rights payable to talent if negotiations for a new labor contract have reached impasse.

***

[10] Based on his individual contract terms, Tom Hanks reportedly realized some $40 million as a share of gross profits on *Forrest Gump* through the end of 1994 and Jack Nicholson similarly made roughly $70 million from *Batman*.

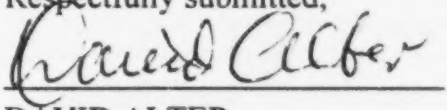
One key difference between sports and entertainment highlights entertainment employees' particular concern with the sports-industry generated version of the exemption at issue in this case. In the world of sports, there is on the surface an arguable justification for some degree of employer collaboration--a justification not shared in entertainment. Sports leagues claim to need common rules and assert those rules must be focused on generating competitive balance to make the product attractive. In the sports context, such arguments may justify a particular labor-market restraint under the "rule of reason", *see, e.g., NCAA v. Board of Regents*, 468 U.S. 85 (1984); they do not in any event warrant invocation of an antitrust exemption. Whatever the weight of these arguments in sports, they have no place whatever in the context of entertainment where the employers are not similarly engaged in leagues.

The consequence of the hands-off approach taken by the Court of Appeals is to give insulation from antitrust challenge to the entertainment world, which is far larger than the world of sports and which moreover presents none of the intrinsic justifications for a degree of employer collaboration.

CONCLUSION

For the reasons stated herein, the Screen Actors Guild, Inc., American Federation of Television and Radio Artists, Directors Guild of America and Writers Guild of America, as amici, respectfully submit that this Court should reverse the judgment below and clarify that terms of employment become exempt from potential antitrust liability based only upon the employees' acceptance as reflected in a collective bargaining agreement and that employment terms collusively imposed by employers after bargaining has failed are not exempt.

Respectfully submitted,



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In the Supreme Court of the United States

OCTOBER TERM, 1995

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v.

PRO FOOTBALL, INC., D/B/A WASHINGTON REDSKINS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether members of a multi-employer bargaining unit may claim the protection of an implied labor exemption from the federal antitrust laws after the collective bargaining contract has expired, the employers and the union have reached an impasse in negotiations over a new contract, and the employers have acted collectively to impose new terms of employment.

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Cases—Continued: Page

Lodge 76, Int'l Ass'n of Machinists v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) 21
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In the Supreme Court of the United States

OCTOBER TERM, 1995

NO. 95-388

ANTONY BROWN, ET AL., PETITIONERS

v.

PRO FOOTBALL, INC., D/B/A WASHINGTON REDSKINS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION

The United States and the Federal Trade Commission have primary responsibility for enforcement of the antitrust laws. Accordingly, they have a direct interest in the correct formulation of any exemption to the application of those laws grounded in competing policies based on federal labor law. The United States filed a brief as amicus curiae in this case in the court of appeals and at the petition stage in this Court.

STATEMENT

1. This is an antitrust action brought by professional football players who were placed on "developmental squads" of National Football League (NFL) team owners. A collective bargaining agreement between the owners and the players' union, which had no provision for developmental squads or for fixed salaries, expired in 1987, and the owners and players began negotiations towards a new agreement.[1] In 1989, the owners adopted a resolution allowing each team to maintain a developmental squad of six first-year players, whose salaries were to be a fixed amount, agreed upon by all the teams. That resolution was a departure from the customary NFL practice of establishing all players' salaries through individual negotiation. Pet. App. 6a.

In subsequent bargaining with the union, the owners proposed to pay all developmental squad players a fixed salary of $1,000 per week during the 1989 NFL season. After the players' union rejected the concept of fixed salaries, the team owners declared on June 16, 1989, that collective bargaining had come to impasse. The NFL then unilaterally imposed the developmental squad proposal, and the Commissioner of the NFL warned team officials that any team that exceeded the $1,000 salary cap would be subject to disciplinary action. Pet. App. 7a.

Several players (petitioners here) then brought this action to challenge the developmental squad salary agreement. The owners (respondents) con-

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[1] The expired agreement and the prior history of labor relations between the NFL and the players' union are described in *Powell* v. *NFL*, 930 F.2d 1293 (8th Cir. 1989), cert. denied, 498 U.S. 1040 (1991).

tended that their agreement to impose uniform salaries was protected from antitrust scrutiny by an implied, "nonstatutory" labor exemption from the antitrust laws. The district court struck that defense, ruling that the owners' immunity expired when the prior collective bargaining agreement expired (Pet. App. 75a-79a), or, at the latest, when the parties reached impasse in their negotiations (*id.* at 80a-86a). The district court also ruled that the fixed-salary provisions were not shielded by an implied exemption from the antitrust laws because they were "never encompassed in the expired collective bargaining agreement." *Id.* at 86a. The district court subsequently granted summary judgment for petitioners on liability (*id.* at 93a-115a), and, after a jury trial on damages, awarded them more than $30 million in damages and permanently enjoined respondents from collectively setting regular season salaries for any category of players. *Brown* v. *Pro Football, Inc.*, 1993 Trade Cas. (CCH) ¶ 70,260 (D.D.C. 1993).

2. A divided panel of the court of appeals reversed. Pet. App. 1a-60a. The majority ruled that the fixed-salary agreement is legal because "the nonstatutory labor exemption shields from antitrust challenge alleged restraints on competition imposed through the collective bargaining process, so long as the challenged actions are lawful under the labor laws and primarily affect only a labor market organized around a collective bargaining relationship." *Id.* at 10a. In so ruling, it rejected petitioners' argument that the nonstatutory labor exemption "applies only where a union has manifested its consent to a restraint on trade by signing a collective bargaining agreement," *id.* at 14a, as well as the argument that the exemption

expires when the parties reach impasse in negotiations on a new collective bargaining agreement, see *id.* at 20a-21a.

The court acknowledged that each of this Court's previous cases involving the implied labor exemption arose in the context of an antitrust challenge to a union-employer agreement that was still in force. Pet. App. 15a. But it did not consider that point dispositive, for it viewed the nonstatutory labor exemption as a "proper accommodation between the congressional policy favoring *collective bargaining* under the [National Labor Relations Act (NLRA)] and the congressional policy favoring free competition in business markets." *Ibid.* (citation omitted; emphasis added by court of appeals). It reasoned that "the juxtaposition of policies giving rise to the exemption focuses on collective bargaining as a *process*, not merely on the *product* of that process—the collective bargaining agreement." *Ibid.* The majority therefore concluded that "the exemption must be broad enough in scope to shield the entire collective bargaining process established by federal law." *Id.* at 16a.

Postulating a "delicate balance of countervailing power that characterizes the [collective bargaining] process," the court stated that "[i]njecting the Sherman Act into the collective bargaining process would disrupt this balance by giving unions a powerful new weapon, one not contemplated by federal labor laws." Pet. App. 20a-21a. Accordingly, the court reasoned, "a proper respect for the national labor policy" requires recognition of the exemption "as a potential shield for all lawful actions taken by either unions or employers pursuant to the collective bargaining process." *Ibid.* The court recognized that

its holding "requires employees involved in a labor dispute to choose whether to invoke the protections of the NLRA or the Sherman Act," and that, in effect, if employees wish to invoke the protections of the antitrust laws, they must "forego unionization or even decertify their unions." *Id.* at 30a. But, the court remarked, "[i]f [employees] choose to avail themselves of the advantages of the collective bargaining process," they have "many benefits" under the federal labor laws (*ibid.*), and, "under the system established by the federal labor laws, employees win concessions not by filing antitrust lawsuits, but with shrewd bargaining, favorable grievance settlements, victories in arbitration, and, when necessary, by striking" (*id.* at 31a).

Judge Wald dissented. Pet. App. 34a-60a. She maintained that the majority's decision "sharply tilts the playing field in employers' favor, and because of that, will erode the vitality of collective bargaining itself." *Id.* at 34a. She further suggested that, because the majority's decision "'effectively gives [employers] * * * the benefit of the antitrust exemption without having to pay for it' through concessions at the bargaining table, * * * [t]he symmetry, mutuality, and give-and-take that lie at the heart of bargaining process are irretrievably lost." *Id.* at 49a.

Starting from the principle that, "[a]bsent special statutory or judge-made exemption, a multi-employer agreement unilaterally imposing uniform industry-wide terms of employment * * * runs afoul of the antitrust laws," Pet. App. 35a, Judge Wald concluded that an implied labor exemption does not shield from antitrust scrutiny such terms when they are unilaterally imposed after the parties have reached

impasse in the collective bargaining process. *Id.* at 59a. She stressed that, while employers may not unilaterally impose terms of employment during collective bargaining, "after impasse, the employer is free [under federal labor law] to unilaterally impose terms reasonably encompassed in bargaining proposals already rejected by the union, because at that point the employer has *exhausted* its statutory duty to bargain." Pet. App. 52a. Therefore, she argued, after impasse, the operation of the antitrust laws does not frustrate the collective bargaining process, and "when an agreement is no longer in sight or even being sought[,] immunity from antitrust liability for terms employers unilaterally impose should terminate." *Id.* at 60a.

SUMMARY OF ARGUMENT

In holding that the implied labor exemption from the antitrust laws shields employers' concerted actions in fixing wages from antitrust scrutiny unless and until employees decertify their union, the court of appeals extended that exemption far beyond its proper scope. Because of the fundamental importance to national economic policy of the Sherman Act, antitrust exemptions must be narrowly construed. In particular, an antitrust exemption to accommodate a separate regime of federal law should be recognized only if the exemption is necessary to make the conflicting statutory scheme work. Even then it should be confined to the minimum extent necessary.

To give effect to federal labor law, it is necessary to shield the terms of collective bargaining agreements from collateral attack by the signatories under the Sherman Act. Collective bargaining could not

operate if labor agreements setting hours and wages, once reached, could be assailed by the parties to the agreements as unreasonable restrains of trade. And because, once a collective bargaining agreement expires, employers have an obligation under federal labor law to maintain the status quo until the parties reach either a new agreement or an impasse in their negotiations, it is also necessary to extend until impasse the antitrust immunity for the terms of the labor agreements maintained by the employer during the bargaining period.

When the parties have reached impasse, however, there is no longer a justification for shielding collective action fixing wages from antitrust scrutiny. After impasse, federal labor law no longer prohibits employers from altering the terms of employment, and individual members of a multi-employer bargaining unit may make interim arrangements with the union on an individual basis. Employers can then comply with both labor law and antitrust law, and should do so. A broader exemption, lasting even after impasse and as long as the employees maintain a collective bargaining relationship with the employer, would sacrifice the protections of antitrust law without the need to accommodate competing requirements of labor law.

In rejecting an impasse standard and holding that employees must decertify their union to pursue remedies under the Sherman Act, the court of appeals has inappropriately required employees to choose between two sets of statutory rights afforded to them by Congress. Nothing in the text or legislative history of the antitrust laws or the National Labor Relations Act (NLRA) suggests that Congress intended to grant a broad antitrust immunity to em-

ployers of unionized employees, or to preclude those employees from pursuing antitrust remedies presumptively available to all. Moreover, the imposition of such a burden on the right of self-organization granted to employees by the NLRA would disserve rather than promote a central policy of the NLRA itself. The court of appeals also gave undue weight to the need to preserve the union-employer balance in the collective bargaining process. The NLRA is not concerned with any particular balance between unions and employers. Indeed, it is withdrawal of the antitrust cause of action that would interfere with the free play of economic forces between employees and employers anticipated by the NLRA. The broad exemption fashioned by the court of appeals also would create a disincentive to serious bargaining, by providing employers with a valuable immunity without requiring them to negotiate for it.

Although there may be cases in which it is not entirely clear whether the parties have reached impasse, that determination is not outside the competence of the courts. In cases like this one, where the employers have unilaterally imposed a change in the terms of employment, no difficulty in determining the point of impasse exists, for such a change amounts to an assertion by the employers that impasse has occurred; otherwise the employers would be committing an unfair labor practice by departing from the status quo while good faith bargaining is still occurring. In other cases, where employers are continuing in force collective restraints embodied in an expired labor agreement, there may be justification for continuing the exemption for such time as is reasonable to allow employers to ascertain, upon advice of counsel, that impasse has in fact occurred

and to adjust their business operations accordingly. Beyond that point, however, an implied antitrust immunity for agreements among employers to fix wages would no longer be grounded in the need to accommodate federal labor law.

ARGUMENT

AN EMPLOYER IS NOT SHIELDED FROM ANTITRUST SCRUTINY BY AN IMPLIED LABOR EXEMPTION TO THE ANTITRUST LAWS ONCE COLLECTIVE BARGAINING HAS REACHED IMPASSE AND THE EMPLOYER HAS IMPOSED TERMS OF EMPLOYMENT

The court of appeals held that so long as employees have a collective bargaining relationship with their employers, they may not invoke antitrust law to challenge their employers' concerted actions to fix wages. See Pet. App. 6a, 28a, 32a-33a. That ruling fails to take account of this Court's admonitions that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 350-351 (1963); accord *National Gerimedical Hosp. & Gerontology Ctr.* v. *Blue Cross*, 452 U.S. 378, 388-389 (1981). That "well established" principle (*id.* at 388) reflects the fundamental importance of the antitrust laws as an element of national economic policy. It also reflects the cardinal rule of statutory construction that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974).

Those principles apply fully to accommodation of the antitrust laws with the labor laws, which are also an expression of fundamental national policy. Any exemption from the antitrust laws to accommodate national labor policy must be firmly grounded in what "labor policy requires," *Connell Construction Co.* v. *Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 622 (1975), and should operate only to the extent that there is an actual conflict with a requirement of federal labor law. See *United Mine Workers* v. *Pennington*, 381 U.S. 657, 666 (1965); *National Gerimedical*, 452 U.S. at 390.

No such conflict requiring an ouster of the antitrust law exists once the parties have reached impasse in their negotiations over a new collective bargaining agreement. After that point, it is possible to give effect to the requirements of both labor law and antitrust law, and there is no justification for favoring one regime at the expense of the other. When collective bargaining has reached impasse and the employer has imposed terms of employment, therefore, an implied labor exemption from the antitrust laws should not shield the employer. Accordingly, the NFL may not claim the exemption in this case.

1. a. Well before the enactment of the NLRA, it was established that concerted action by a group of employers to control the labor market is subject to the antitrust laws. *Anderson* v. *Shipowners Ass'n*, 272 U.S. 359 (1926); see also *Radovich* v. *National Football League*, 352 U.S. 445 (1957).[2] Indeed, the

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[2] In *Radovich*, the Court summarily rejected as "lacking in merit" (352 U.S. at 454) the National Football League's argument that a prospective player's allegation of a League boycott

court of appeals acknowledged that, in the absence of an exemption, a multi-employer agreement unilaterally imposing uniform industry-wide terms of employment would be subject to the antitrust laws. See Pet. App. 24a (citing *Radovich*); *id.* at 35a (dissenting opinion). But the majority believed that "the inception of a collective bargaining relationship irrevocably alters the governing legal regime," *id.* at 24a, such that when there is "a labor market organized around a collective bargaining relationship, antitrust policy must give way" to labor law, *id.* at 28a.[3]

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constituted a "labor dispute" immunized from antitrust scrutiny by the Clayton Act and the Norris-LaGuardia Act. Brief for Respondents National Football League *et al.* at 59-63 (No. 94, 1956 Term) (Dec. 1956).

[3] The court of appeals suggested that employers' anticompetitive restraints on labor markets (as opposed to product markets) are of little concern to the antitrust laws. Pet. App. 24a. The court also acknowledged, however, that petitioners would have had an antitrust cause of action against respondents if they had abandoned their union. *Id.* at 30a. The Sherman Act indeed makes illegal "every" unreasonable contract, combination and conspiracy in restraint of trade, 15 U.S.C. 1, and does not exclude employers' agreements to fix wages (or other terms and conditions of employment).

This case does involve a separate antitrust issue of whether a collective restraint on wages is per se invalid or is subject to the rule of reason. The joint venture characteristics of sports leagues may justify analysis under the rule of reason of unilateral league restraints on wage competition, even though those restraints would be illegal per se in different industries. See *Mackey* v. *NFL*, 543 F.2d 606, 618-620 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977); *McNeil* v. *NFL*, 790 F. Supp. 871, 896-897 (D. Minn. 1992). The district court found an antitrust violation even under the rule of reason; the court of appeals did not reach that issue, which would be open for its consideration on remand.

Nothing in the text of the NLRA mentions any antitrust exemption at all, let alone an exemption specially for employers. Nor does the legislative history of the NLRA indicate any intent on the part of Congress to create an antitrust immunity for employers. Sections 6 and 20 of the Clayton Act (15 U.S.C. 17, 29 U.S.C. 52) in conjunction with the Norris-LaGuardia Act (29 U.S.C. 101-115) do grant unions a statutory labor exemption to the antitrust laws. That exemption, however, is available only for union conduct taken in the course of a dispute over terms and conditions of employment, and then only "[s]o long as a union acts in its self-interest and does not combine with non-labor groups." *United States* v. *Hutcheson*, 312 U.S. 219, 232 (1941); *Connell*, 421 U.S. at 622.[4] The NFL is not entitled to the benefit of the

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[4] It has been suggested that, because the first sentence of Section 6 of the Clayton Act, 15 U.S.C. 17, states that "[t]he labor of a human being is not a commodity or article of commerce," all employer-imposed restraints on labor markets are exempt from antitrust scrutiny (whether or not the employees are unionized). See Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 Geo. L.J. 19, 26-30 (1986); see also Pet. App. 38a (dissent, summarizing commentary). As Judge Wald observed (*ibid.*), it is "not possible to square this minority view with the development of our antitrust jurisprudence." The rest of Section 6 is plainly aimed at *employees'* organizations such as unions, and the legislative history of the Clayton Act gives no indication that Congress intended to immunize *employers'* unilateral (*i.e.*, not negotiated with a union) combinations in restraint of labor markets. Moreover, a blanket exemption for all restraints of labor markets, including those imposed by employers, could not be reconciled with this Court's decisions in *Anderson* and *Radovich*. See also *Pennington*, 381 U.S. at 662 (noting that neither Section 20 of the Clayton Act nor Section 4 of the Norris-LaGuardia Act "expressly deals

statutory exemption. *Radovich*, 352 U.S. at 454. And while the existence of an express antitrust immunity does not absolutely preclude the possibility of an implied immunity as well, it does counsel care in recognizing and defining such an implied immunity. Cf. *United States* v. *Borden Co.*, 308 U.S. 188, 201 (1939).

This Court has also long recognized the importance of the Sherman Act as a "comprehensive charter of economic liberty." *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 4 (1958); see *United States* v. *Topco Associates*, 405 U.S. 596, 606 (1972). In light of that importance, the Court has stressed that exemptions to the Sherman Act must be narrowly construed, *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 231 (1979), and that an implied exemption to the antitrust laws may be recognized only if that exemption is "necessary to make the [conflicting statutory scheme] work and even then only to the minimum extent necessary." *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963). "This is the guiding principle to reconciliation of the two statutory schemes." *Ibid.*

b. Acting with caution and precision, the Court has recognized a narrow immunity from the antitrust laws for the terms of an existing collective bargaining agreement that are intimately related to the employees' wages, hours, and working conditions, and

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with arrangements [in labor markets] between unions and employers"). The lower courts have therefore correctly concluded that Section 6 does not put collective action by employers to restrict competition in labor markets outside the reach of the antitrust laws. See *Mackey* v. *NFL*, 543 F.2d at 616-618; *McCourt* v. *California Sports, Inc.*, 600 F.2d 1193, 1197 n.7 (6th Cir. 1979).

that do not extend beyond the bargaining unit that is a party to the agreement. See *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 688-690, 692-693 (1965) (opinion of White, J.); cf. *Pennington*, 381 U.S. at 664-666. Although sometimes referred to as a "nonstatutory" immunity (as opposed to the "statutory" exemption for unilateral union actions), the implied labor exemption to the Sherman Act recognized in *Jewel Tea* is in fact firmly grounded in the requirements of another statutory enactment, the NLRA. As the Court carefully summarized the rationale for the exemption in *Connell Construction Co.*, "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." 421 U.S. at 622.

Essential to the formulation of the exemption in *Jewel Tea* was the need to reconcile two federal statutory regimes that would otherwise have been in direct conflict. The purpose of the NLRA is to provide a means "to the ordering of the parties' industrial relationship through the formation of a contract." *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 485 (1960). Moreover, the "strong labor policy" embodied in the NLRA favors "the association of employees to eliminate competition over wages and working conditions." *Connell*, 421 U.S. at 622. The implied labor exemption simply reflects the common sense recognition that "the goals of federal labor law never could be achieved" if labor contracts, once reached, were declared invalid under the antitrust laws. *Ibid.*; see *Jewel Tea*, 381 U.S. at 712 (opinion of

Goldberg, J.); *Pennington*, 381 U.S. at 664 (because "wages lie at the very heart of those subjects about which employers and unions must bargain," and because the law contemplates "agreements between the union and employers in a multi-employer bargaining unit," "a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws"). As Judge Wald observed, "the collective bargaining scheme * * * would be mortally undercut if collective bargaining agreements were subject to collateral attack * * * as 'combinations in restraint of trade.'" Pet. App. 43a.

Thus, just as all three judges on the court of appeals agreed that petitioners could proceed against respondents under the antitrust laws if they decertified their union, they also all agreed that, if the creation and pay of the developmental squads at issue in this case were treated in an NFL-union collective bargaining agreement, that agreement would be exempt from attack under the antitrust laws while it was in force. But in this case, the old collective bargaining agreement expired, and the new management proposal for fixed salaries (which had not been included in any previous collective bargaining agreement) was resisted by the union and was then imposed by the team owners only after they declared an impasse in the negotiations. This case is therefore not governed by *Jewel Tea*, in which the employer was attempting to attack, through the antitrust laws, an arrangement to which it had agreed pursuant to the collective bargaining regime established by the labor laws. See 381 U.S. at 688 (opinion of White, J.). Rather, the issue in this case is the duration of any implied immunity for the employers' concerted action

taken after the collective bargaining agreement expired.

2. The court of appeals was correct to reject the district court's conclusion (Pet. App. 72a-80a) that an implied labor exemption protects only wage restraints to which the union currently agrees—a position that would require termination of the exemption immediately upon expiration of a collective bargaining agreement. *Id.* at 19a; see *id.* at 51a-52a (dissenting opinion). That position cannot be reconciled with the obligation of employers under federal labor law to maintain the terms of employment established by an expired collective bargaining agreement until impasse. *NLRB* v. *Katz*, 369 U.S. 736, 742-743 (1962). If the antitrust exemption ended before impasse, employers who feared that continued adherence to particular terms pending negotiation of a new agreement might constitute an antitrust offense would face conflicting legal obligations. They could modify the objectionable terms, but they would thereby risk being charged with an unfair labor practice, for the NLRA forbids unilateral changes in working conditions prior to impasse. See *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988); *Katz*, 369 U.S. at 743 (unilateral imposition of conditions of employment during period of bargaining is a "circumvention of the duty to negotiate"). Or they could adhere to the terms of the expired agreement, but that course would carry the risk of treble damages under the antitrust laws. In those discrete circumstances, there is a conflict between the labor laws and the antitrust laws such that both cannot be given full effect, and the antitrust laws should yield to the more specific, and later enacted, obligations of the NLRA.

See *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992).

The situation is significantly different once the parties have reached impasse in their bargaining for a new contract. After that point, employers no longer have a duty under the labor laws to maintain the status quo of the expired contract. As this Court has pointed out, once there is an impasse, members of a multi-employer bargaining unit are free as a matter of labor law to negotiate individual arrangements on an interim basis with the union, since such individual, interim agreements "deter * * * unit fragmentation" and thereby promote collective bargaining. *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 454 U.S. 404, 415-416 (1982). The same reasoning logically leads to the conclusion that, after impasse, it is not an unfair labor practice for individual employers in a multi-employer bargaining unit to make unilateral, interim changes in their terms of employment, notwithstanding union opposition, if those changes have been offered as good-faith proposals during the bargaining process. After impasse, therefore, labor law no longer requires that employers act collectively to maintain or enforce provisions inconsistent with the antitrust laws. Employers are then able to comply with both the labor laws and the antitrust laws, and should so comply.

That does not mean that, after impasse, members of a multi-employer bargaining unit will be forbidden from continuing in force all the terms of an expired collective bargaining agreement. As a matter of substantive antitrust law, employers who, after impasse, independently decide to impose terms of employment do not violate Section 1 of the Sherman Act, for that Act applies only to agreements. *E.g.*, *Monsanto Co.* v.

Spray-Rite Serv. Corp., 465 U.S. 752, 761, 763 (1984). The expiration of antitrust immunity, therefore, will not lead to a disruption of labor markets or a wholesale revision of terms of employment merely because the parties have reached a (perhaps temporary) standoff in their negotiations. Indeed, since (as we have suggested, p. 17, *supra*) members of a multi-employer bargaining unit may independently impose interim terms of employment that were previously put forth in good faith in the collective bargaining, many employers' terms imposed independently after impasse may well resemble or duplicate those that were part of the expired agreement. But *concerted* action by employers after impasse to impose particular terms on employees (or to notify one another before doing so, cf. *United States* v. *Container Corp.*, 393 U.S. 333 (1969)) should be subject to antitrust scrutiny, whether or not the employees are unionized.[5]

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[5] Some joint action by employers in a multi-employer bargaining unit must, of course, fall within an implied exemption if the collective bargaining regime is to operate. Thus, resumption of good-faith bargaining between the union and the employers in the multi-employer bargaining unit to reach a new agreement would be within the implied exemption, just as the bargaining to negotiate the expired contract was exempt. Also, there may be circumstances in which joint action by employers, even if subject to antitrust scrutiny, would be reviewed under the rule of reason rather than a per se rule of invalidity. See *Mackey* v. *NFL*, 543 F.2d at 618-620. For example, in the case of a sports league, a joint decision by the employers to lock out their employees and to field teams with replacement employees might under some circumstances be permissible, even though a similar action would constitute a per se illegal concerted refusal to deal in other contexts, since it could be impractical for some teams that were the subject of a

3. The court of appeals believed, however, that a much broader antitrust immunity for employers was necessary to give room to the process of collective bargaining contemplated by the NLRA. At the heart of its rationale was a concern that applying the antitrust laws would disrupt "the delicate balance of countervailing power * * * by giving unions a powerful new weapon, one not contemplated by the federal labor laws." Pet. App. 19a-20a. That reasoning is seriously flawed in several respects.

The main objection to the court of appeals' conclusion is that it departs from the principle mandating narrow construction of exemptions to the Sherman Act. As we explain above (pp. 9-10, 13, *supra*), the fundamental importance of the antitrust laws requires that any implied exemption be no broader than necessary to permit operation of a separate statutory scheme that imposes conflicting duties. After impasse, nothing in employers' specific legal obligations established by the NLRA conflicts with the antitrust laws' prohibition against combinations in restraint of trade. Yet, in rejecting an impasse standard and holding that employees must

labor dispute to use replacement employees while other teams used their regular employees or fielded no team at all. Cf. *NLRB* v. *Brown*, 380 U.S. 278 (1965) (when one member of a multi-employer bargaining unit is the subject of a selective strike, other members of the unit may lock out their employees and hire temporary replacement workers, to preserve the integrity of the multi-employer group). Similarly, the rule of reason may in some circumstances shield continued collaboration by members of a multi-employer unit to maintain joint benefit or retirement plans previously established through the bargaining process. In short, expiration of the blanket implied exemption does not preclude specific accommodations of labor law policies in applying the antitrust laws.

decertify their union to pursue remedies under the Sherman Act, the court of appeals has inappropriately required employees to choose between two sets of statutory rights afforded them by Congress. A central policy of the NLRA—its conferral on employees of a right to self-organization—would be burdened rather than promoted by needlessly denying only to unionized employees the antitrust remedies presumptively available to all.[6]

Second, contrary to the court of appeals' belief (Pet. App. 19a-20a), the labor laws are not addressed to preserving any *particular* balance of power between unions and employers. As the Court stated in *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 490 (1960), the NLRA does not authorize the NLRB "to act at large in equalizing disparities of bargaining power between employer and union." Yet that is essentially what the court of appeals has undertaken to do here; the court's result was predicated on a concern that unionized employees should not have (what it perceived as) the "powerful new weapon" of an antitrust cause of action at their disposal, since that would give them "an advantage in bargaining

[6] Enhancing the right of employees to self-organize was the primary thrust of the NLRA. *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 316 (1965). Congress also gave great emphasis in the NLRA to the role of unionization and collective bargaining in promoting labor peace. See *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 247 (1939). There is no reason to believe that the Congress that wrote a law to facilitate unionization also meant to create by implication in that same law a sweeping pro-employer antitrust exemption that employees can avoid only by abandoning their unions or not forming them in the first place—even when there is no conflict between the requirements of the two legal regimes, as is the case after impasse.

over a salary provision about which union members do not care deeply enough to strike." Pet. App. 20a.

To the contrary, it is withdrawal of the antitrust cause of action from the union that would intrude on the collective bargaining process by "regulat[ing] the choice of economic weapons" available to the parties. *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. at 490. As the district court observed, the implied labor exemption can actually provide a disincentive for the employer to bargain earnestly and to sign a new collective bargaining agreement; if the employer is satisfied with the terms of the expired agreement, "all it need do is maintain the status quo and continue to receive exception from antitrust liability for restraints to which the union no longer agrees." Pet. App. 73a. The court of appeals' ruling would effectively give the employer the benefit of an antitrust exemption without having to pay for it through concessions at the bargaining table.[7]

Third, as Judge Wald pointed out, the majority's stress on the need for the exemption to protect the *process* of collective bargaining is basically miscon-

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[7] Particularly unpersuasive is the court of appeals' apparent preference that unions strike rather than sue under the antitrust laws (Pet. App. 20a). The stated policy of the NLRA is to reduce the number of strikes. 29 U.S.C. 151. It does not follow that, because unionized employees would not strike over a particular term or condition of employment, they should not be able to challenge it as a violation of the Sherman Act or some other law. Unions have numerous economic weapons short of a strike. See, *e.g.*, *NLRB* v. *Insurance Agents Int'l*, 361 U.S. at 480-481; *Lodge 76, Int'l Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 133-134, 148-149 (1976). The NLRA does not require that unionized employees precipitate a workplace crisis to advance their bargaining goals.

ceived. Compare Pet. App. 16a-17a with *id.* at 48a-49a. It is true in a sense that the NLRA focuses on the bargaining process, rather than the result of that process, in that neither the NLRB nor the courts have authority to impose contract terms on the parties. *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108 (1970). An antitrust cause of action against the employer for concerted action in fixing wages does not contravene that principle, however. Even if the employees were successful in their antitrust suit, the eventual result would not necessarily be the striking of the offending term from the (eventually negotiated) contract. The parties could still bargain to place a restraint on wages in the labor agreement, and the union could extract some concessions from management in return.[8] The presence—or even the potential presence—of an antitrust cause of action may play a role in the bargaining, but it does not impede the parties' freedom to arrive at terms. It may even serve as an inducement for the parties to reach agreement.

It is also true that the NLRA gives the parties considerable room to choose economic tactics during the collective bargaining process, as well as after impasse, by freeing them from other regulatory constraints. See, *e.g.*, *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986). But it is not accurate to analyze an antitrust cause of action as

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[8] Indeed, even after the Eighth Circuit ruled in *Mackey* that the NFL's "Rozelle Rule," restricting players' ability to sign with different teams after the expiration of their contracts, violated the Sherman Act, the players' union agreed to significant restrictions on free agency in subsequent collective bargaining agreements. See Schneider, *Unsportsmanlike Conduct: The Lack of Free Agency in the NFL*, 64 S. Cal. L. Rev. 797, 814-815 (1991).

"imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts." *Id.* at 614. Employers may act individually to impose (at least interim) terms of employment after impasse, and thus they may engage in "the exercise of economic self-help." *Id.* at 615. It is only concerted action among the employers that creates the potential for liability under the Sherman Act.

Finally, after the point of impasse, when it becomes possible to apply fully both the labor laws and the antitrust laws, the relation between the NLRA and the Sherman Act is basically no different from the relation between the NLRA and other federal statutes affecting the balance of power between labor and management. The Fair Labor Standards Act (29 U.S.C. 201 *et seq.*), for example, prohibits employers from imposing wages below the federal minimum or hours (at regular compensation) above the federal maximum. The Occupational Safety and Health Act (29 U.S.C. 651 *et seq.*) similarly bars management from maintaining working conditions that, in the absence of that statute, they might wish to maintain. Yet the NLRA does not require that employees decertify their unions to pursue their remedies under those statutes; nor does it suggest that unionized employees must be willing to strike over violations of the statutes if they deem the violations important. Whether or not these statutes give unions weapons that courts might think are too powerful in the context of collective bargaining, employers can, and so must, obey them.

4. The district court expressed concern about an impasse standard for the termination of the implied immunity on the grounds that the precise point of impasse may be uncertain, and that different courts

(and the NLRB) might reach different determinations as to whether the parties had reached impasse. Pet. App. 75a, 83a. The district court also noted this Court's observation that impasse is often only a temporary deadlock, eventually resolved through economic force or a change in mind leading to the renewal of negotiations. *Id.* at 82a (citing *Bonanno Linen Service*, 454 U.S. at 412). It is possible, in fact, that impasse could occur more than once within the course of a single labor dispute, which might create uncertainty in determining at any particular point whether an antitrust cause of action existed.

While those concerns are not without some substance, we nonetheless believe that impasse is the logical point of reference for termination of the implied labor exemption, given that employers can then comply with both labor law and antitrust law and the implied exemption is therefore no longer needed to resolve a conflict between the two regimes. There may, however, be justification for the implied exemption to endure after impasse for such time as would be reasonable in the circumstances for employers to take steps to ascertain, upon advice of counsel, that impasse has in fact occurred and to adjust their business operations to eliminate any previously immunized restraint that could give rise to antitrust liability. But in no event should immunity continue when employers have acted jointly to make a unilateral, post-impasse *change* in terms of employment to implement the provision at issue, as occurred in this case. Adoption of such a change is, in effect, an assertion by the employers that impasse has occurred, since the change would constitute an unfair labor practice if made prior to impasse. There is no reason for concern about possible uncertainty in

determing the point of impasse if employers have taken action in reliance on their own conclusion that the parties have reached impasse in their negotiations.

In cases in which employers have acted in concert to continue in force a restraint that was embodied in an expired collective bargaining agreement, the courts will have to examine whether impasse has in fact occurred. Notwithstanding the district court's expressed concerns, that inquiry is well within the competence of the courts and should not unduly delay the progress of the antitrust litigation. Cf. *Jewel Tea*, 381 U.S. at 686 (opinion of White, J.) (in antitrust suits, district court may consider in first instance whether restraint in collective bargaining agreement touched on mandatory bargaining subjects); *id.* at 710 n.18 (opinion of Goldberg, J.) (agreeing with Justice White's opinion on that point). Nor, in such cases, is there likely to be a danger of conflict between the courts and the NLRB, since the employer's continuation of the status quo is not an unfair labor practice.

5. We recognize that it is a much debated issue of policy whether employers, and especially the owners of professional sports league teams, should have immunity from the antitrust laws that lasts as long as the collective bargaining relationship, including periods of impasse. Congress has not extended the antitrust immunities based in the labor laws so far as the employers would wish, however, and it is for Congress to resolve the relevant policy issues. As a practical as well as constitutional matter, Congress, not the courts, has the expertise to decide the economic and political questions inherent in respondents' claim to immunity. Congress has been attentive to concerns that the unique characteristics of professional

sports leagues require modification of otherwise strict requirements of the antitrust laws.[9] There is little reason to believe, therefore, that the policy arguments made in this case about the need to temper antitrust enforcement in the professional sports context will go unheeded in Congress, whether or not those arguments eventually succeed in that forum.

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[9] In 1961, Congress gave the NFL, as well as professional baseball, basketball, and hockey leagues, a limited antitrust exemption for pooled broadcasting rights agreements. See Sports Broadcasting Act of 1961, Pub. L. No. 87-331, 75 Stat. 732, codified at 15 U.S.C. 1291 *et seq.* In 1966, when the NFL sought to merge with the American Football League, it sought and obtained from Congress another antitrust immunity allowing the combining of the two leagues into a single professional football league. Pub. L. No. 89-800, 80 Stat. 1508, codified at 15 U.S.C. 1291 (second sentence). Legislative efforts are currently underway to give the NFL yet another antitrust immunity that would eliminate its antitrust liability if, under certain circumstances, it were to prevent member teams from relocating. See Fans Rights Act of 1995, S. 1439, 104th Cong., 1st Sess.; Fan Freedom and Community Protection Act of 1995, H.R. 2740, 104th Cong., 1st Sess.

CONCLUSION

The judgment of the court of appeals should be reversed,[10] and the case should be remanded for futher proceedings.

Respectfully submitted.

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[10] The National Labor Relations Board concurs that the court of appeals' expansive formulation of the labor exemption is wrong as a matter of law, and may do serious harm to the nation's antitrust and labor policies if not reversed.

No. 95-388

In the Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,
Petitioners,

v.

PRO FOOTBALL, INC., d/b/a
WASHINGTON REDSKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF THE NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION AND NATIONAL BASKETBALL PLAYERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37 of the Rules of this Court, The National Hockey League Players Association, National Football League Players Association, Major League Baseball Players Association and National Basketball League Players Association respectfully move for leave to file the accompanying brief as amici curiae in support of Petitioners. Petitioners have consented to the filing of the brief; Respondents have not.

INTEREST OF THE NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION AND NATIONAL BASKETBALL PLAYERS ASSOCIATION

The NHLPA, NFLPA, MLBPA and NBPA are the sole and exclusive collective bargaining representatives of players in, respectively, the National Hockey League ("NHL"), National Football League ("NFL"), Major League Baseball, ("MLB") and National Basketball Association ("NBA"). As a result, they are regularly engaged in multi-employer bargaining in professional team sports—a process that is being seriously undermined as a result of the decision of the United States Court of Appeals for the District of Columbia Circuit.

The NHLPA, NFLPA, MLBPA, and NBPA's analysis of the practical significance and consequences of the decision below thus provides an important perspective which they believe will assist the Court. As representatives of unionized employees in professional team sports, in which bargaining over salaries and other significant terms of employment is reserved by the unions for individual employees, they have a unique familiarity with collective bargaining and the application of the nonstatutory labor exemption in this context. As set forth in the accompanying amicus brief, they are concerned that the decision of the court below will severely damage both labor and antitrust policies and will, if not reversed, significantly impede the ability of employers and employees in professional team sports, entertainment and similar multi-employer industries to reach collective bargaining agreements.

In submitting the acompanying amicus brief supporting the Petitioners, the NHLPA, NFLPA, MLBPA, and NBPA wish to explain how, based on their experience, the decision below adversely affects both antitrust policy and collective bargaining. They believe that this perspective will assist the Court in its consideration of this case

and therefore respectfully move for leave to file the accompanying brief as amici curiae.

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BRIEF AMICI CURIAE OF THE NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION AND NATIONAL BASKETBALL PLAYERS ASSOCIATION IN SUPPORT OF PETITIONERS

Pursuant to Rule 37 of the Rules of this Court, The National Hockey League Players Asociation, National Football League Players Association, Major League Baseball Players Association and National Basketball League Players Association respectfully move for leave to file the accompanying brief as amici curiae in support of Petitioners. Petitioners have consented to the filing of the brief; Respondents have not.

INTEREST OF AMICI

The National Hockey League Players Association ("NHLPA"), National Football League Players Association ("NFLPA"), Major League Baseball Players Association ("MLBPA") and National Basketball Players Association ("NBPA") are the sole and exclusive collective bargaining representatives of players in, respectively, the National Hockey League ("NHL"), the National Football League ("NFL"), Major League Baseball ("MLB") and the National Basketball Association ("NBA"). Each of these amici are regularly engaged in multi-employer bargaining in professional team sports—a process that is being seriously undermined as a result of the decision below. Further, the employee members of *amici* have repeatedly been the targets of anticompetitive restraints unilaterally imposed by their employers, seeking to eliminate the competition over individually negotiated salaries and other terms of employment which the unions in these industries have preserved for their members. Accordingly, *amici* have a strong interest in the Court's resolution of the extremely important questions of antitrust and labor law policy presented by this case.

SUMMARY OF ARGUMENT

The decision below, which vastly expands the scope of the non-statutory labor exemption, purports to do so in order to strike an "accommodation" between the antitrust laws and the labor laws. In reality, the decision has exactly the opposite effect. By completely ousting the antitrust laws from unionized labor markets, the "new" labor exemption constructed by the Court of Appeals seriously damages both antitrust and labor law policies. It permits employer cartels in such industries to violate the antitrust laws with impunity and, at the same time, completely undermines multi-employer collective bargaining. This is particularly true in industries like professional team sports and entertainment, in which the unions have exercised their rights under the labor laws to leave the

negotiation of salary and other significant terms of employment to individual bargaining.

The real life experience of *amici* and their members demonstrates the severe and adverse consequences to antitrust and labor law policies which directly flow from such an overbroad antitrust exemption. When employers in professional team sports have claimed to be shielded from antitrust scrutiny for their unilateral imposition of labor market restraints, the result has been lockouts, strikes, and union decertifications. Indeed, the recent labor turmoil in professional basketball and baseball, as well as the three year decertification of the players union in professional football, can all be linked directly to efforts by the employers in those industries to claim antitrust immunity for unilaterally imposed restraints on competition over employment terms reserved for individual player bargaining. By contrast, when the antitrust laws have been properly applied to unionized labor markets in professional team sports, history shows that collective bargaining has been successful and resulted in compromises of employer and employee interests which resulted in labor peace.

To prevent the decision below from undermining both antitrust and labor law policies, this Court need only apply its own historic rationale for the non-statutory labor exemption for restraints on substantive employment terms: to protect certain union-employer *agreements*, in order to effectuate the employee-organizing objectives of the statutory labor exemption. There is nothing in the National Labor Relations Act, or in any precedent of this Court, to support the conclusion that labor policy requires the implication of an antitrust exemption to protect the desire of employers, in industries in which individual bargaining has been preserved, to eliminate competition among themselves for the services of such employees.

By properly limiting the scope of the non-statutory labor exemption to the terms of employment contained in union-employer agreements, both antitrust and labor law

objectives will be served. Employees will no longer be forced by the decision below to abandon collective bargaining to assert their antitrust rights; and an implied antitrust immunity will be properly limited to only that narrow area where a "clear repugnancy" between the antitrust and labor laws exists.

ARGUMENT

I. THE EXPERIENCE IN PROFESSIONAL TEAM SPORTS DEMONSTRATES THAT THE VASTLY EXPANDED ANTITRUST EXEMPTION CREATED BY THE DECISION BELOW SEVERELY UNDERMINES BOTH ANTITRUST AND LABOR LAW POLICY

This case involves an agreement by the employer-members of an industry-wide, multi-employer bargaining unit to completely eliminate the individual competition over wages which the NFL players union has lawfully preserved for its members. There is no dispute that such an agreement by employers to eliminate all wage competition in a labor market would violate the antitrust laws if not subject to some special antitrust exemption. The Court below implied such an unlikely exemption, for employers to cartelize their labor markets, from the National Labor Relations Act, based on its belief that multi-employer, collective bargaining would be severely damaged if the antitrust laws apply. In fact, the experience of professional team sports demonstrates that just the opposite is true. Permitting competing clubs unilaterally to impose anticompetitive restraints without antitrust review has severely disrupted union-employer relations in these sports, while the application of the antitrust laws to scrutinize such anticompetitive agreements has facilitated stable and productive collective bargaining.

In 1965, this Court recognized the existence of a non-statutory (*i.e.*, implied) labor exemption to cover certain "union-employer agreements" for the purpose of "accommodating the coverage of the Sherman Act to the policy of the labor laws." *Local No. 189, Amalagamated Meat*

Cutters v. *Jewel Tea Co.*, 381 U.S. 676, 689 (1965); *see also United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). For more than two decades, the lower courts adhered to the principles of *Jewel Tea* and *Pennington* and only applied the non statutory labor exemption in professional team sports to restraints contained in union-employer agreements. In particular, the courts were careful not to permit the exemption to be used by competing sports team owners as a shield for unreasonably anticompetitive restraints imposed against the will of their employees. Such restraints, enforced by the power of sports commissioners to severely punish teams who depart from league rules, were generally found by the lower courts to violate the rule of reason because they were found to be far more restrictive than reasonably necessary to achieve any legitimate objective.[1] The result, for almost twenty-five years, was a careful accommodation of antitrust and labor law policies in the non-statutory labor exemption, in which unilaterally-imposed unreasonable restraints of trade were prohibited, while successful multi-employer bargaining---yielding compromise agreements in which some restraints were continued, but others

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[1] *See, e.g., Mackey* v. *National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Smith* v. *Pro-Football, Inc.*, 420 F. Supp. 738 (D.D.C. 1976), *aff'd on other grounds*, 593 F.2d 1173 (D.C. Cir. 1978); *Kapp* v. *National Football League*, 390 F. Supp. 73, 82 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); *Robertson* v. *National Basketball Association*, 389 F. Supp. 867 (S.D.N.Y. 1975); *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972); *Linseman* v. *World Hockey Association*, 439 F. Supp. 1315 (D. Conn. 1977); *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F. Supp. 1049, 1057 (C.D. Cal.), *injunction reinstated sub nom., Haywood* v. *National Basketball Association*, 401 U.S. 1204 (1971) (Douglas, J.) (restraints on competition for players imposed by owners without union agreement found to violate the rule of reason). Reasonable restraints imposed by sports leagues, however, have been upheld. *See Molinas* v. *National Basketball Association*, 190 F. Supp. 241 (S.D.N.Y. 1961); *Neeld* v. *National Hockey League*, 594 F.2d 1297 (9th Cir. 1979).

were eliminated—was able to take place. By contrast, the purest example of the repeated disruptions in labor relations which occur in professional team sports when employers believe that they can unilaterally eliminate competition over individually negotiated contracts without antitrust scrutiny is provided by professional baseball, where the anomalous antitrust exemption for Major League Baseball's reserve clause, not the non-statutory labor exemption, has been in effect. *See Federal Baseball Club v. National League*, 259 U.S. 200 (1922); *Flood* v. *Kuhn*, 407 U.S. 258 (1972).

The first application of an expanded non-statutory labor exemption, for restraints imposed without union agreement, occurred in 1989 as a result of the Eighth Circuit's decision in *Powell* v. *National Football League*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied* 498 U.S. 1040 (1991), which held that restraints contained in an expired collective bargaining agreement ("CBA") would continue to be protected by the exemption as long as there was a union in place. The exemption was then expanded even further by the decision of the Second Circuit in *National Basketball Ass'n* v. *Williams*, 45 F.3d 684 (2d Cir. 1995) (petition for a writ of *certiorari* pending), and the decision of the Court of Appeals below, which extended antitrust immunity to *any* restraints on competition imposed by multi-employer bargainers in a unionized labor market (whether or not a union ever agreed to them). The combined effect of these decisoins has been to cause havoc to labor relations in professional team sports, where unions have always preserved their members' rights to individually negotiate employment contracts. The consequences, as discussed below, are devastating for both antitrust and labor law policies.

A. Professional Football

Professional football provides one of the most dramatic examples of how an overbroad non-statutory labor exemption can undermine multi-employer collective bargaining,

particularly in industries like professional team sports, while a narrow exemption, carefully limited to union-employer agreements, can promote both antitrust and labor law policy. Specifically, prior to the Eighth Circuit's decision in *Powell,* NFL clubs were unable to impose unreasonbale restraints on competition for players without union agreement, due to the application of the antitrust laws, and the result was the successful negotiation of compromise collective bargaining agreements ("CBA"). By contrast, after the non-statutory labor exemption was expanded in *powell* to shield the NFL clubs' unilateral imposition of anticompetitive restraints that the union had not agreed to, the NFL players were forced to renounce all collective bargaining in order to protect their antitrust rights.

Prior to 1989, the NFL clubs on several occasions, imposed unreasonable restraints on competition in the labor market without union agreement, but the lower courts consistently limited the non-statutory labor exemption to its proper confines and applied the antitrust laws to strike down these unreasonable restraints. *See, e.g., Smith* v. *Pro Football Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey* v. *National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Kapp* v. *National Football League*, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979). In that context, the NFL clubs thus came to realize that they could not unilaterally impose such restraints, and the collective bargaining relationship improved. As a result, in 1977, and, again, in 1982, the NFL players and owners were able to negotiate successive five year CBAs (with the players getting certain improvements, but agreeing to continue various restraints for a limited period of time).

In 1987, however, the NFL clubs' determination to continue what turned out to be extremely severe restraints on the market for player services, under a claim of antitrust immunity, made it impossible for the players and owners

to engage in productive collective bargaining. Under the two CBAs that were in effect during the ten years prior to the 1987 season, only one NFL player who was subject to draft choice compensation moved to another team at the expiration of his player contract, even though thousands of players supposedly were eligible to market their services to other teams under the "right of first refusal/compensation" rules of the expired CBA. The NFLPA attempted to negotiate a new CBA in which players would have the opportunity to market their services to NFL clubs without unreasonable restriction. The NFL clubs refused and, as a result, the football players engaged in a brief unsuccessful strike.[2]

Thereafter, the NFL clubs—competitors in the market for player services—continued to impose, over the union's objection, various unreasonable restraints in that market. A group of NFL players and the NFLPA commenced an antitrust class action against the NFL and its clubs, to challenge the continued unilateral imposition of these unreasonable restraints on competition for player services. *Powell* v. *National Football League*, No. 4-87-917 (D. Minn. 1987) (Doty, J.) The district court in *Powell* held that a multi-employer groups' continued imposition of unreasonable restraints contained in an expired CBA were not shielded by the non-statutory labor exemption after an "impasse" had been reached in the negotiations over a new agreement. *Powell* v. *National Football League*, 678 F. Supp. 777, 788 (D. Minn. 1988). On November 1, 1989, however, a divided panel of the United States Court of Appeals for the Eighth Circuit reversed, holding that the non-statutory labor exemption from the antitrust laws immunizes anticompetitive restraints previously agreed to in an expired CBA as long as there is a continuing "labor relationship." *Powell* v. *National Football League*,

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[2] The NFL used "replacement" players in games that were broadcast by the television networks, and, after four weeks, the players reported back to work without a new CBA.

930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

As a direct result of the Eighth Circuit's decision in *Powell*, the NFL players were faced with the Hobson's choice of either surrendering their antitrust rights to challenge the employer-imposed unreasonable restraints, or giving up their labor law rights to engage in collective bargaining and other union-related labor activities. Forced to make this choice, the NFL players overwhelmingly voted, in November of 1989, to renounce their collective bargaining rights, effectively terminating the NFLPA as their collective bargaining representative. Individual NFL players then commenced new suits against the unreasonable labor market restraints imposed by the NFL and its clubs, in which the players asserted their individual rights under the antitrust laws. *See, e.g., McNeil* v. *National Football League*, 790 F. Supp. 871 (D. Minn. 1992); *Jackson* v. *National Football League*, 802 F. Supp. 226 (D. Minn. 1992).

Beginning with the 1989 season, the NFL clubs implemented "Plan B," which continued an anticompetitive right of first refusal/compensation system for the vast majority of players and significantly reduced player benefits.[3] Plan B also threatened to eliminate individual bargaining by players altogether, and to implement a leaguewide wage scale covering all players beginning with the 1993 NFL season. For four consecutive seasons, from 1989 to 1992, the NFL players suffered the adverse effects of Plan B, without any collective bargaining or labor law rights.

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[3] In addition to imposing unreasonable restraints in the market for player services, Plan B attempted to terminate and replace the players' collectively bargained pension plan; terminated the accrual of severance; froze playoff money; froze injury protection pay for veterans and reduced it for rookies; froze termination pay; lowered minimum salaries; reduced life, health and dental insurance; froze expansion bonuses; and froze pre-season player per diems.

In September 1992, after a three-month trial, the jury verdict in *McNeil* found that the NFL's right of first refusal/compensation restrictions were unreasonable restraints of trade in violation of § 1 of the Sherman Act. Subsequently, a new class action was filed on behalf of all NFL players, challenging the continued implementation of these or similar unreasonable restraints on competition for player services. *White* v. *National Football League*, No. 4-92-906 (D. Minn. 1992). In January 1993, faced with the prospect of an imminent preliminary injunction decision in *White*, the NFL and its member clubs agreed to a global settlement of the *White* class action and other player suits which granted NFL players, for the first time, the opportunity to be unrestricted free agents (at present, after four years of NFL service). The NFL clubs also agreed to pay out a total of $195 million to settle class actions and the more than twenty different player lawsuits filed against them. In exchange for these substantial benefits, the players compromised by agreeing to a salary cap system (limiting, in accordance with specified rules, the total amount of salaries for each NFL team).

It was only in the Spring of 1993—following the *White* antitrust settlement and more than three years after the decertification of the NFLPA—that a majority of NFL players signed authorization cards to reconstitute their union, and collective bargaining resumed. On May 6, 1993, the NFL clubs and the NFLPA agreed to a new CBA which among other things, incorporated the free agency/salary cap system of the *White* settlement and provided for long-delayed increases in pension, termination pay, playoff money and other benefits for players. Just this past December, the NFLPA and the NFL clubs announced a proposed extension of their collective bargaining agreement until at least the year 2000.

The experience of professional football in the wake of *Powell* provides a stark example of how collective bargaining is completely destabilized by an overbroad inter-

pretation of the non-statutory labor exemption. The clubs' unilateral imposition of anticompetitive restraints in the belief that they were protected from antitrust scrutiny resulted first in labor strife and then in union decertification. Neither result served any conceivable national labor policy. If not for the application of the antitrust laws to owner-imposed, unreasonable restraints in *McNeil* and *White*, the NFL players would still have no union, and multi-employer bargaining would have no place in professional football.

B. Professional Basketball and Hockey

The history of collective bargaining in professional basketball and hockey also demonstrates that the application of the antitrust laws to unreasonable labor market restraints imposed without union agreement serves both antitrust and labor law objectives. In each sport, when the multi-employer group has unilaterally implemented unreasonable anticompetitive restraints, believing itself to be immune from the antitrust laws, the result has been a disruption in labor relations. Applying the antitrust laws to employer-imposed restraints, by contrast, has fostered collective bargaining.

Professional basketball never experienced a work stoppage prior to the 1994 decision in *Williams*, which held the antitrust laws inapplicable to all unreasonable restraints imposed by the members of a multi-employer bargaining group, as long as the employees in that industry are represented by a union. Prior to that time, when NBA clubs had unilaterally imposed anticompetitive restraints on the market for player services, those restraints had been scrutinzed under the antitrust laws. *See Robertson* v. *National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975) (holding that various restraints on competition for players which were imposed without union agreement, were not covered by the non-statutory labor exemption and were likely to constitute antitrust violations). *See also Denver Rockets* v. *All-Pro Manage-*

ment, Inc., 325 F. Supp. 1049 (C.D. Cal.), *injunction reinstated sub nom. Haywood* v. *NBA*, 401 U.S. 1204 (1972). As a result, the NBA owners came to realize that they could not unilaterally impose restraints which would violate the antitrust laws, and that an agreement with the players was in their best interests. A ten year class action settlement in the *Robertson* litigation, modifying the league's player restraints, was signed in 1976. This, in turn, led to the successful negotiation of companion collective bargaining agreements embodying, among other things, the terms of the *Robertson* class action settlement, which covered the 1976 through 1986 NBA seasons.

In 1982, the NBA clubs threatened to change unilaterally the *Robertson* system of player restraints to include a so-called salary cap system. The players filed a lawsuit in response under both the antitrust laws and the *Robertson* settlement agreement, which led to a Special Master decision that the owners could not impose such restraints unilaterally. *Lanier* v. *National Basketball Ass'n*, 82 Civ. 4935 (S.D.N.Y. 1982). Faced with this ruling, which prevented them from imposing any anticompetitive restraint they desired, the NBA clubs instead engaged in good faith negotiations, which culminated in a new salary cap/free agency system agreed to by the players and the NBPA in 1983. *See Wood v. National Basketball Assn'*, 809 F.2d 954 (2d Cir. 1987) (non-statutory labor exemption held to cover this system of restraints agreed to by the players' union).

At the end of the 1986-87 season, the NBA clubs again sought to impose anticompetitive labor market restraints without union agreement, renewing their argument for an expanded application of the non-statutory labor exemption. In response, a class of professional basketball players filed a new antitrust lawsuit, *Bridgeman* v. *National Basketball Association*, No. 87-4001 (D.N.J. 1987). Once again, it was only after the district court

rejected the clubs' blanket assertion of antitrust immunity (leaving the exemption issue open for factual findings at trial), that the owners and the players were able to negotiate a new seven year class action settlement, continuing the salary cap, but significantly increasing the free agency opportunities for players to market their services. This class action settlement, in turn, again made it possible for the players and clubs to agree upon a new seven year collective bargaining agreement, incorporating, among other things, the terms of the *Bridgeman* settlement.

The successful accommodation of antitrust and labor policy was disrupted when, on June 17, 1994, the NBA clubs filed a lawsuit against seventeen NBA players and a defendant player class in the United States District Court for the Southern District of New York, styled *National Basketball Association* v. *Williams,* No. 94 Civ. 4488 (KTD) (S.D.N.Y. 1994). The clubs sought to continue a set of labor market restraints without union agreement. A group of then-current and prospective NBA players counterclaimed under the Sherman Act. Thereafter, the United States Court of Appeals for the Second Circuit, affirming the result reached by the district court below, held that all labor market restraints imposed by the members of a multi-employer bargaining unit are exempt from the antitrust laws unless and until the workers in these markets decertify their unions. *See Williams*, 45 F.3d 684 (2d Cir. 1995).

As a direct result of the *Williams* decision, labor relations in the NBA were thrown into chaos. This past summer, the NBA experienced its first lockout in history, as the clubs insisted on anticompetitive restraints which they believed they could impose with antitrust immunity. At the same time, a heated election among NBA players was initiated before the NLRB to determine whether a majority of players wished to decertify the players' union in order to assert their individual antitrust rights against the clubs' unilateral imposition of player restraints. The

entire NBA season was jeopardized because the clubs threatened to continue their lockout indefinitely if a majority of players voted to decertify the union. In September, a majority of NBA players voted not to decertify their union and a new collective bargaining agreement was reached. However, the fact that the NBA clubs publicly opposed union decertification in order to protect their antitrust exemption illustrates how an overbroad interpretation of the non-statutory labor exemption can turn national labor policy on its head.

With respect to professional hockey, prior to the decision in *Williams* and the decision below, the antitrust laws were applied to labor market restraints unilaterally imposed by the NHL clubs at the same time that successful collective bargaining was taking place. For example, unilaterally imposed, unreasonable restraints on competition for hockey players were found subject to antitrust scrutiny in *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972) and *Linseman* v. *World Hockey Ass'n*, 439 F. Supp. 1315 (D. Conn. 1977). By contrast, when the NHLPA and the NHL clubs included certain player restraints in an unexpired CBA, the non-statutory labor exemption was held to apply. *See McCourt* v. *California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979). As a result, the labor market in professional hockey remained free from unilaterally imposed unreasonable restraints, while successful collective bargaining also took place.

The decision below apparently misconstrued the recent labor history in professional hockey as somehow supporting the view that collective bargaining is facilitated by the absence of antitrust protections for the labor market. *Brown*, 50 F.3d 1041, 1057-58 (D.C. Cir. 1995). In fact, this history illustrates the contrary point. After expiration of the last CBA in the NHL in September 1993, the NHL clubs made it clear that they wanted a new "salary cap" or salary tax to eliminate price competition for player services—a demand which the NHLPA and its

members strongly resisted. The NHL clubs, however, did not unilaterally impose a salary cap or tax—even after an impasse in the negotiations had been reached—because of their belief that the antitrust laws would apply.[4] Instead, the NHL owners resorted to a lock-out (an economic weapon not prohibited by the antitrust laws in a unionized industry) and a new CBA was eventually reached which did not include a salary cap or tax. The collective bargaining process worked only because the NHL clubs believed that the antitrust laws prohibited them from unilaterally imposing the new salary cap restraints they desired.

C. Professional Baseball

For more than a century, the clubs comprising the American and National Leagues operated under an agreement that, once a player entered into an employment contract with a particular club, he became the property of that club for the duration of his career or, at least, until his club no longer wished to employ him. That agreement, known as the "reserve system," precluded competitive bidding for players' services. And, because the clubs jointly had monopoly power in the market for players' services, the agreement also effectively fixed prices in that labor market. The legality of this multiemployer group's agreement to impose labor market restraints was challenged under the antitrust laws. But in *Federal Baseball Club* v. *National League*, 259 U.S. 200 (1922), and *Flood* v. *Kuhn*, 407 U.S. 258 (1972), this Court held, in an acknowledged "anomaly," that Major League

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[4] Harry Sinden, the President-General Manager of the Boston Bruins admitted publicly to just these antitrust concerns, stating that "[a]t the moment we have no plans to implement anything the way the baseball owners did. We don't have the (antitrust) protection they do . . . We do have the right to implement our final proposal, as long as the proposal is not (tantamount to) a restraint of trade." *See* Joe Gordon, *NHLPA Eyes Suit; Owners May Hear Antitrust Charge, Boston Herald*, December 25, 1994, at B24.

Baseball's nearly century old reserve system was exempt from scrutiny under those laws.

Profesional baseball thus provides the purest example of the unstable, disruptive labor relations that result when a multiemployer group believes itself to be operating in an area beyond the reach of the antitrust laws. Since July 1966, Major League baseball players have been represented by the MLBPA, an exclusive bargaining representative within the meaning of section 9 of the NLRA. There has been a work stoppage in each of the last eight collective bargaining negotiations between the clubs and the MLBPA—player strikes in 1972, 1980, 1981, 1985, and 1994-1995, and club lockouts in 1973, 1976 and 1990. And, at least since 1976, this conflict and disruption has been generated, virtually in its entirety, by the clubs' attempt to impose anticompetitive restraints in the market for players' services.

In 1976, Major League players for the first time successfully challenged the clubs' anticompetitive reserve system. Following a victory in arbitration, the players secured a limited right of free agency—that is, the right to offer their services on the market consisting of clubs in both leagues. *See In re The Twelve Clubs Comprising National League, et al.*, 66 LAB.CAS. 101 (1976) ("Messersmith Arbitration"). Since that time, believing the antitrust laws to be no barrier to their imposition of anticompetitive restraints in the labor market, the clubs have regularly attempted to roll back players' free agency rights and regain the power to fix or otherwise restrain prices in the market for players' services. Each time, the players and the MLPBA have strongly resisted, and disruptive confrontations have resulted:

• In 1976, the clubs locked out the players. Their goal was to re-establish the purity of the reserve system which had been lost in the *Messersmith* case and again to eliminate competition in the market for players' services.

• The player strikes in 1980 and 1981 were likewise caused by club initiatives designed to eliminate free agency and the resulting competition in the labor market. The clubs attempted to require that a club which successfully bid for the services of a free agent player "compensate" the player's former club for its loss with a player from the successful bidder's roster. The clubs also sought to eliminate individual salary negotiations and replace them with an industry-wide compensation schedule.

• In 1985, and again in 1990, the clubs proposed that players' compesnation be limited to a defined percentage of revenues—that is, the clubs proposed a salary cap system. Through this system, the clubs sought to restrict price competition in the market for players' services by artificially limiting the amount that each club was permitted to spend on player compensation. These attempts by the clubs to undermine free agency resulted in a brief player strike in 1985 and a lockout by the clubs in 1990.

• Finally, the player strike that began in 1994-1995 was the direct result of the clubs' renewed attempt to impose a salary cap system on the market for players' services, without the agreement of the union. The strike resulted in the cancellation of the 1994 post-season, including the World Series. There is still no collective bargaining agreement in Major League Baseball today.

The history of disruptive labor relations in baseball can thus be traced to the clubs' repeated attempts to use their monopoly power to eliminate or restrict competition in that market. The clubs made these attempts as a direct result of their perception that they are uniquely immune from application of the antitrust laws and that they can legally agree to and unilaterally impose on the market for player services whatever restraints they can obtain in a contest of strength. The stakes are high, so the clubs have a strong incentive to test the players' resolve on any occasion that presents itself and the players have

an equally strong incentive to resist. The result is a chaotic, hostile, nonproductive labor relationship that lurches from work stoppage to work stoppage, disrupting and damaging the careers of players, the business of baseball (and related businesses in the communities affected), and the welfare of consumers. By contrast, if the baseball clubs perceived that their unilateral agreement to and imposition of restraints would be subject to the antitrust laws, their labor relations, like those in other professional sports industries where the antitrust laws have been applied, would stabilize.[5]

II. ANTITRUST AND LABOR LAW POLICIES ARE PROPERLY ACCOMMODATED BY LIMITING THE NON-STATUTORY LABOR EXEMPTION TO TERMS OF EMPLOYMENT WHICH ARE CONTAINED IN UNION-EMPLOYER AGREEMENTS, ESPECIALLY IN INDUSTRIES IN WHICH INDIVIDUAL BARGAINING OVER SALARIES AND OTHER SIGNIFICANT TERMS OF EMPLOYMENT IS PRESERVED

The non-statutory labor exemption, which has been implied by this Court in order to effectuate the collective bargaining and union organizing objectives of the statutory labor exemption, is properly limited to restraints on substantive employment terms contained in union-employer agreements. Any broader antitrust immunity would contravene the Congressional intent manifest in the statutory labor exemption, and undermine antitrust and labor law policies. Indeed, in no industry is the need for this limitation clearer than in professional team sports, where salaries and other significant employment terms have always been set by individual negotiations between individ-

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[5] Indeed, even the President of the National Football League, Neil Austrian, recently stated in a television interview that baseball's antitrust protection "really precipitated and prolonged the [1994-1995] strike." *Moneyline* (CNN, December 7, 1995, Transcript #1565) (Appendix, p. 2a).

ual employees and employers. At the same time, the clubs in these sports have repeatedly sought to suppress competition among themselves over such contracts. There is no basis in national labor policy for implying an antitrust immunity for these competing employers, who cartelize their labor markets, to impose such anticompetitive restraints.

Congress has pasesd only one law granting antitrust immunity in the labor context. The statutory labor exemption is contained in those provisions of the Clayton Act [6] and the Norris-Laguardia Act,[7] which declare that labor unions are not combinations or conspiracies in restraint of trade and which specifically exempt certain union but not employer, activities from the reach of the antitrust laws. The "non-statutory" labor exemption was found by this Court to be implied from the statutory labor exemption and the need to protect certain union-employer agreements reached as a result of collective bargaining under the National Labor Relations Act. It "has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions." *Connell Construction Co.* v. *Plumbers & Steamfitters Local No. 100,* 421 U.S. 616, 622 (1975). As this Court has explained:

> The basic sources of organized labor's exemption from the antitrust laws are §§ 6 and 20 of the Clayton Act, and the Norris-LaGuardia Act. These statutes declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws. They do not exempt concerted action or agreements between unions and nonlabor parties. The Court has recognized, however, that a proper accommodation between the congressional policy favoring

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[6] 15 U.S.C. § 17; 29 U.S.C. § 52.

[7] 29 U.S.C. §§ 104-105, 113.

> collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that *some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions.*

Connell, 421 U.S. at 621-22 (emphasis added).

The proper scope of the non-statutory labor exemption was first fully articulated by this Court in *Jewel Tea, supra*, and *Pennington, supra*. A careful reading of these decisions confirms that union agreement is a necessary and critical prerequisite of the exemption.

In *Pennington*, a small coal operator alleged that the United Mine Workers had agreed with a group of large companies in the industry to impose a high wage scale on smaller, relatively labor intensive operators in order to drive them out of business. The union argued that such an agreement between a union and an employer was exempt from the antitrust laws. Writing for the Court, Justice White stated that a union has an implied non-statutory labor exemption from the antitrust laws to enter into labor agreements with a multiemployer bargaining group, and may, if acting in furtherance of the employees' interests, seek to enter into similar agreements with other employers. *Jewel Tea*, 381 U.S. at 665. The Court explicitly held, however, that the labor laws did not preempt the application of the antitrust laws and that the union had forfeited the protection of the non-statutory labor exemption by pursuing the anticompetitive interests of the employer group. *Id.* at 668-69.

By contrast, in *Jewel Tea*, issued the same day as *Pennington*, the Supreme Court applied the non-statutory labor exemption to shield a collective bargaining agreement designed to protect the interests of employees by limiting late night hours. Justice White, writing for Chief Justice Warren and Justice Brennan, set forth what have come to be recognized as the established parameters of the non-statutory labor exemption; no antitrust liability

shall attach to labor market restraints embodied in a union-employer agreement if those restraints advance legitimate employee goals in a labor market and restrain trade no more than is necesary to achieve those goals. *Jewel Tea*, 381 U.S. at 688-89.

In articulating the limited scope of the non-statutory labor exemption in these two cases, the Supreme Court expressly rejected the argument, set forth in Justice Goldberg's opinion (concurring in *Jewel Tea* and dissenting in *Pennington*) for three members of the Court, that *any* employer-union agreement concerning mandatory subjects of collective bargaining should be immune from antitrust challenge, even if the agreement primarily restricts competition in a product market and is designed to further the interests of employers, not employees. As Justice White explained:

> This is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining, regardless of the subject or the form and content of the agreement. . . . [T]here are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws.

Jewel Tea, 381 U.S. at 664-65. Thus, a majority of the Court refused to extend the non-statutory labor exemption even to restraints contained in union-employer agreements which primarily advance anticompetitive employer interests, let alone to employer restraints being imposed without any union agreement at all.

Fundamental principles of statutory interpretation set forth by this Court, which only permit an antitrust exemption to be judicially implied to the minimum extent necessary, and then only where there is a "clear repugnancy" between the antitrust laws and a competing statute, under-

score the fact that the scope of the non-statutory labor exemption for restraints on substantive employment terms, must be limited to those restraints contained in union-employer agreements. *See, e.g., National Gerimedical Hospital* v. *Blue Cross*, 452 U.S. 378, 388 (1981); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963). As this Court has ruled, there is nothing in the legislative history of the NLRA which would justify a broad implied pre-emption of the antitrust laws from unionized labor markets. *See Connell*, 421 U.S. at 634 ("[t]here is no legislative history . . . suggesting that . . . Congress thought allowing antitrust remedies . . . would be inconsistent with the remedial scheme of the [labor laws]"), *see also Pennington*, 381 U.S. at 668-69.[8]

Certain union-employer agreements are afforded an implied, non-statutory antitrust immunity only because it is essential to do so in order to preserve a union's statutory ability to engage in collective bargaining, *i.e.*, both parties to a labor agreement must be protected from antitrust liability for entering into such agreements if any meaningful bargaining is to take place. By contrast, a broader immunity for restraints unilaterally imposed by employers is clearly not necessary to resolve any "repugnancy" between antitrust and labor policy. As this Court held in an early labor-antitrust dispute: "[B]enefits to

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[8] To the contrary, as repeatedly explained by this Court, the existence of federal labor law rights does not create a blanket immunity for employers from other federal or state statutes:

> Nor has Congress *ever* seen fit to exclude unionized workers and employers from laws establishing federal minimum employment standards. . . . It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers.

Metropolitan Life Ins. Co. v. *Massachusetts*, 471 U.S. 724, 755-56 (1985) (emphasis added). *See also, Livadas* v. *Bradshaw*, 114 S. Ct. 2068, 2081 (1994); *Fort Halifax Packaging Co.* v. *Coyne*, 482 U.S. 1, 20-22 (1987).

organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires." *United States* v. *Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949).

Applying these principles, the entire rationale for implying a limited antitrust immunity for restraints on substantive terms of employment contained in certain union-employer agreements disappears when the restraints are being unilaterally imposed by employers. In that situation —which is clearly presented here—the fundamental policy underlying the statutory labor exemption—to protect the rights of employees to act in combination and bargain collectively—would be undermined, rather than furthered, by permitting employers to shield their unilaterally-imposed restraints from antitrust scrutiny.

This limited scope of the non-statutory labor exemption is particularly warranted in industries like professional team sports and entertainment, where, unlike in manufacturing industries, unions have always preserved for their members the right to individually negotiate salaries and other significant terms of employment. As this Court recognized long ago:

> where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours *or expressly to leave certain areas open to individual bargaining.*

J.I. Case Co. v. Labor Board, 321 U.S. 332, 338 (1944) (emphasis added). This is precisely the situation in professional team sports, where the great variation in the circumstances and abilities of individual players has caused unions to preserve for their members the right to individually negotiate their contracts. The employers in these industries understandably desire to eliminate competition among themselves over such contract terms, but there is nothing in the NLRA which grants them anti-

trust immunity to unilaterally impose such anticompetitive restraints.

Nor is there any merit to the argument adopted by the Court of Appeals below that confining the non-statutory labor exemption to terms of employment agreed to by a union would impede collective bargaining by giving too strong a weapon to employees. First, all that multi-employers need to do is to comply with the rule of reason and the antitrust laws in implementing their proposals [9]—just as they must comply with antiduscrimination, health, safety and other laws in implementing terms of employment. Second, employers in a multi-employer bargaining unit are free to engage in lockouts and similar tactics directed at securing a CBA as long as a union is in place. *See Brown*, 50 F.3d at 1066-68 (Wald, J., dissenting).[10] As the experience in professional team sports demonstrates, applying the antitrust laws to unilaterally imposed labor market restraints simply levels the playing field so that stable and productive collective bargaining can take place.

In sum, this Court should reverse the decision below, as well as the holdings in *Williams* and *Powell*, to make it clear that the non-statutory labor exemption is dependant upon continued union agreement and that employees do not have to decertify their unions to assert their antitrust rights. By doing so, the Court will be adhering to basic principles of statutory construction and judicial restraint and effectuating both antitrust and labor law policies.

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[9] *See Molinas* v. *National Basketball Association*, 190 F. Supp. 241 (S.D.N.Y. 1961); *Neeld* v. *National Hockey League*, 594 F.2d 1297 (9th Cir. 1979) (reasonable restraints survive antitrust scrutiny).

[10] Tactics such as a lockout are particularly powerful weapons for employers in professional team sports because the careers of professional athletes are extremely short, usually lasting only a few years.

CONCLUSION

For all of the above reasons, as well as those stated in the Petitioners Brief, this Court should reverse the judgment of the Court of Appeals.

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January 19, 1996

APPENDIX

APPENDIX

Moneyline (CNN) December 7, 1995
Transcript #1565

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NFL PRESIDENT CHEERS CURRENT PRO FOOTBALL CONDITIONS

LOU DOBBS, Anchor: The NFL now facing the major vacancy in Los Angeles and the prospect of disappointing its loyal fans in Cleveland. What can the league do to bring back a measure of stability? The question tonight for my guest the president of the NFL Neil Austrian.

Neil, good to have you with us.

NEIL AUSTRIAN, President, National Football League: Nice to be here, Lou.

LOU DOBBS: I think we should start at the out set by pointing out that while there's a great controversy surrounding teams moving, a lot about players' pay and so forth, you guys aren't doing too badly financially, are you?

NEIL AUSTRIAN: No, I think this will be a record year for the National Football League. We're into the second year of the largest television contract in sports history with five networks. Our occupancy rate, or fan interest, in the sport has never been higher as evidenced by our ratings on television and by attendance in the stadiums. It'll be a good year.

LOU DOBBS: A reasonable backdrop on my thing for NFL executives to say—well if we're going to move teams this is the year to do it. Does that play any part in those decisions?

NEIL AUSTRIAN: It doesn't any part at all. I think the reality is that we've had franchise stability until this year to a great extent, and we view it on that basis.

There's a couple of new realities though that are facing teams.

LOU DOBBS: Right.

NEIL AUSTRIAN: One is escalating player costs and the other is the sort of Damocles of anti-trust legislation where cities who don't get teams threaten to sue us, and I think if you look back in the '80s, we fought the Raiders from moving from Oakland to Los Angeles.

LOU DOBBS: One of the great—one of the great fights in sports history.

NEIL AUSTRIAN: It was. It was a great fight unless you had to pay the piper, and it cost us $50 million to do it. Commissioner Tagliabue was in Washington last week talking with a congressional committee about proposals for new limited anti-trust exemption whereby the league if it intended to try and to have realistic standards for franchise relocation couldn't be sued.

LOU DOBBS: This coming at a time, though, in all reality, in which Congress is looking more at the prospect of removing baseball's anti-trust exemption rather than applying it to other sports. At least that's my understanding of the mood on Capitol Hill.

NEIL AUSTRIAN: To some extent, but I think that what we're talking about is not an anti-trust exemption for labor, which is what baseball's enjoyed—

LOU DOBBS: Right.

NEIL AUSTRIAN: —and which really precipitated and prolonged the strike. We don't want one in labor. We really just it on relocation and the ability to interpret and administer our own internal rules.

LOU DOBBS: Your ratings are up. Your revenues are up. Cleveland is up in arms. Baltimore is obviously rejoicing. Are we going to see more of this, a la Houston and moving to Nashville, that sort of thing?

NEIL AUSTRIAN: Well, as I said earlier, I think that the new reality really is that player costs have escalated dramatically. Under our new salary cap that was negotiated in '93, cash is king. Teams that have excess cash from non-shared revenue, which is stadium revenue, have the ability, as Jerry Jones did, to go out and pay large signing bonuses both to keep their own team and to attract free agents. So, what you have right now is decaying stadiums and a scenario where teams are really facing a different set of economics.

LOU DOBBS: So, you're suggesting that Jerry Jones' model might be the model of the future?

NEIL AUSTRIAN: Not at all.

LOU DOBBS: I didn't think so.

NEIL AUSTRIAN: Not at all.

LOU DOBBS: Well, that situation in which he is so—calling you a cartel. What is going to be the outcome there?

NEIL AUSTRIAN: Basically, we sued Jerry to start the process, given what we really felt was egregious behavior in terms of breaking faith and some commitments he had with NFL properties. The simple fact is Jerry says the pie is going to grow if every team markets their own logos and marks. The pie is not going to grow. This is really about money. Jerry and the Dallas Cowboys have the largest revenue in the league by significant measures.

LOU DOBBS: Right.

NEIL AUSTRIAN: He doesn't want to share it and would like to increase it. He wants a greater share of the pie. When you think of what NFL properties does in terms of the benefits for all its member clubs, marketing a club, but more than that, Lou, marketing the league. We're national. We're not local.

LOU DOBBS: He owns the stadium, however.

NEIL AUSTRIAN: Correct.

LOU DOBBS: Other owners don't. That's—but that's an economic and business advantage that he should—should he not enjoy and take advantage of?

NEIL AUSTRIAN: The league was founded on some revenue sharing principles. When I go back and look what happened in the late '50s and early '60s, when the Maris [*sp.*] from New York, when the Halas in Chicago, when Art Modell [*sp.*] in Cleveland when the Redskins all gave up their own television contracts and said we'll turn it back to the league and share equally, that's the principle the league was founded on.

LOU DOBBS: Right.

NEIL AUSTRIAN: That's what promotes the great competition we've got on the field.

LOU DOBBS: And it doesn't sound like quick resolution as between the NFL and Jerry Jones and it sounds like a future with not great stability for a lot of teams.

NEIL AUSTRIAN: I'm not certain about that. I think we had a very good meeting today with Mayor White and the people from Cleveland and I think we might—might well work toward some resolutions.

LOU DOBBS: Favorable to Cleveland?

NEIL AUSTRIAN: At this point we haven't finished with their application in terms of why they want to move and we've got a lot more work to do with Cleveland before we can answer that.

LOU DOBBS: So, that deal is far from done?

NEIL AUSTRIAN: That's correct.

LOU DOBBS: All right. Neil Austrian, thanks for being with us.

NEIL AUSTRIAN: Thank you, Lou.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,
Petitioners,

v.

PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE ALLIANCE OF MOTION PICTURE AND TELEVISION PRODUCERS AS AMICUS CURIAE SUPPORTING RESPONDENTS

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BRIEF OF THE ALLIANCE OF MOTION PICTURE AND TELEVISION PRODUCERS AS AMICUS CURIAE SUPPORTING RESPONDENTS

This brief, in support of Respondents Pro Football, Inc., *et al.*, is submitted in accordance with Rule 37 of the Rules of this Court. The Alliance of Motion Picture and Television Producers ("AMPTP") has obtained and is filing herewith the written consent of Petitioners and Respondents to the submission of this brief.

INTEREST OF THE AMICUS

AMPTP represents in multi-employer collective bargaining approximately two hundred companies that produce filmed entertainment for exhibition in theaters and on television (hereinafter "the motion picture industry"). AMPTP conducts such bargaining with thirty-five guilds and unions (hereinafter collectively "unions") that represent employees in the industry. Because labor relations in the motion picture industry may be profoundly affected by the Court's decision, this case is a matter of vital concern to the employers in the industry.

SUMMARY OF ARGUMENT

The circumstances of multi-employer collective bargaining in the motion picture industry differ from those of bargaining in a professional sports league. Because the firms in the industry are not a joint venture, there is no structural necessity for multi-employer bargaining. Employers and unions engage in such bargaining voluntarily because both find it advantageous; either side will abandon it if it no longer appears advantageous. Thus, employees in the industry do not have to choose between collective bargaining and antitrust protection. They can enjoy all rights under the NLRA and whatever protection antitrust law may provide by choosing to bargain in single-employer units.

Adoption of the Solicitor General's position would threaten the continuation of multi-employer bargaining in this and similar industries. During impasse, if a union

used whipsaw tactics, the employers would be deterred by antitrust law from responding with concerted use of economic weapons. Even if employers acted individually during impasse, they would still face daunting antitrust risks because the limited options permitted by labor law would ensure some parallel conduct, and the duty to conduct any renewed negotiations concertedly would necessitate communications among the employers about terms of employment.

National labor policy applies to, and the NLRA adequately governs, employer conduct in a labor market subject to collective bargaining. The NLRA establishes a process that includes bargaining in good faith and resort to economic weapons in aid of bargaining. Impasse is merely a stage in that process.

The national labor policy and labor law principles that apply to single-employer bargaining units also apply to multi-employer units. Labor law addresses adequately the additional considerations raised by a multi-employer unit. Under labor law, concerted unilateral imposition by employers in a multi-employer unit of terms previously offered to the union is a permissible economic weapon during impasse. Unilateral imposition of terms is not different in kind from other economic weapons available to parties in a labor dispute.

A labor market subject to collective bargaining is, at most, peripheral to antitrust law. Historically, there has been little antitrust interest in conduct that affects only a labor market. Antitrust can contribute little to resolution of a labor dispute because, almost always, antitrust would be merely one among many influences on the terms of the collective bargaining agreement that eventually resolves the dispute.

Conduct affecting only a labor market subject to collective bargaining should be governed by labor law, not antitrust law. Both laws concern process, not results. Here, the process of labor law (collective bargaining backed by economic weapons) should prevail over the process of antitrust (competition). An exemption from

the antitrust laws for the entire collective bargaining *process* is necessary to fulfill national labor policy.

In any event, the Court should protect the concerted lockout as a necessary defense against whipsaw tactics.

ARGUMENT

I. THE CIRCUMSTANCES OF MULTI-EMPLOYER COLLECTIVE BARGAINING IN THE MOTION PICTURE INDUSTRY ARE QUITE DIFFERENT FROM THE CIRCUMSTANCES OF BARGAINING IN A PROFESSIONAL SPORTS LEAGUE.

There are important differences in the organization of work and in economic structure between the motion picture industry and a professional sports league. Due to those differences, our industry provides a setting for multi-employer collective bargaining quite different from that of a league.[1]

In the motion picture industry, work by the unionized employees generally is project-based, and therefore episodic. An employee generally does not work for only one employer, but, rather, for a particular employer on a particular film project for a period of weeks or months; and, when that project is finished, the employee may work on a different project for a different employer. During the course of a year, an employee may work for several different employers; and compensation may vary from project to project. In a sports league, by contrast, a player signs a contract with a particular team for one or more entire seasons, and plays under that contract throughout its duration; even after a trade, the player continues to be subject to the same contract (but with a different contracting party).

Unlike the teams in a sports league, the firms in the motion picture industry are not organized as a single

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[1] The offhand statement in Petitioners' Brief [hereinafter "Pet. Br."] 44 that the structures of the two industries are the same is, as will be shown, demonstrably incorrect.

joint venture.[2] Motion picture production companies operate independently of one another. In this industry, there is no organization analogous to the NFL in professional football. Therefore, there is no structural necessity for multi-employer bargaining.[3] Such bargaining occurs only because each union and each employer involved finds it advantageous.

In the motion picture industry, multi-employer collective bargaining has existed for decades, and is entirely voluntary on both sides. The employees are represented not just by one union, but by thirty-five.[4] There are no certified bargaining units. The employers have not challenged the claims by the unions to represent their respective members, and the multi-employer unit within which

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[2] There are also no multi-employer restraints on free movement of employees, such as those in a sports league.

[3] In *North American Soccer League v. NLRB*, 613 F.2d 1379 (5th Cir.), *cert. denied*, 449 U.S. 899 (1980), the Board and the court both found that a multi-employer bargaining unit was appropriate because "the League exercises a significant degree of control over essential aspects of the clubs' labor relations." 613 F.2d at 1382. No such finding has been made, or is possible, with respect to the motion picture industry. There has never been a determination by the NLRB or any court with respect to a multi-employer bargaining unit in the motion picture industry.

[4] AMPTP bargains with the American Federation of Television and Radio Artists; The American Federation of Musicians of the United States and Canada; Directors Guild of America, Inc.; International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, and its twenty-three West Coast Studio Locals; Screen Actors Guild, Inc.; Writers Guild of America, West, Inc.; Writers Guild of America, East, Inc.; Studio Transportation Drivers, Local #399 of the International Brotherhood of Teamsters; International Brotherhood of Electrical Workers, Local #40; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local #78; Southern California District Council of Laborers and its affiliate, Studio Utility Employees, Local #724 (both affiliated with the Laborers' International Union of North America, AFL-CIO); and the Operative Plasterers and Cement Masons International Association of the United States and Canada, Local #755.

bargaining with each union takes place has developed entirely by mutual consent of unions and employers. Although there have been labor disputes, impasses, and strikes from time to time, collective bargaining in the industry is well-established, the multi-employer unit is stable,[5] and in 175 negotiations since 1982, 170 have resulted in a collective bargaining agreement without resort by either side to economic weapons. This record of relative labor peace has benefitted the consuming public as well as the parties.

Thus, in the motion picture industry, employees do not face the stark choice posed by the court of appeals between "the protections of the NLRA or the Sherman Act," Pet. App. 30a. They need not, as Judge Wald put it, "forfeit" either set of protections in order to enjoy the other, Pet. App. 34a. If employees are dissatisfied with multi-employer bargaining or for any other reason want to preserve whatever antitrust remedies are available against concerted employer conduct in the market for their labor, the employees can, through their union, withhold consent from multi-employer bargaining and, instead, bargain with the employers individually, with full enjoyment of all rights under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1994) ("NLRA"). *See, e.g., Detroit Newspaper Publishers Ass'n v. NLRB*, 372 F.2d 569 (6th Cir. 1967) (unions may unilaterally withdraw from multi-employer bargaining unit and bargain with employers individually).

Except in an industry organized as a single joint venture, employees can always have collective bargaining. The choice is not between collective bargaining and antitrust protection, but between *multi-employer* bargaining and antitrust protection. Giving up antitrust protection is simply a corollary of *consenting* to bargaining with a *group* of employers *for the very purpose* of having them

[5] From 1975 to 1982, the employers formerly in a single multi-employer unit broke into two separate multi-employer units. Since 1982, however, the members of the AMPTP have negotiated as a single unit with all of the unions.

act concertedly in the bargaining process. Similarly, because in the motion picture industry there is no structural necessity for multi-employer bargaining, employers can insist on single-employer bargaining if they view that as more advantageous. In contrast, in the case of a sports league, multi-employer bargaining appears to be a necessity.

For the unions in our industry, multi-employer bargaining provides at least the following advantages. First, where work is episodic, employees generally do not work long enough for a single employer to qualify for health and pension benefit plans; therefore, by far the most practical way to establish such plans is on a multi-employer basis. Second, multi-employer bargaining makes it easier for the unions to obtain standardization of scale compensation, other terms of employment, and working conditions throughout much of the industry; and it establishes a pattern likely to be accepted by employers outside the multi-employer unit. Thus, when employees move from employer to employer, most of them work under essentially the same terms and conditions of employment. Third, multi-employer bargaining provides substantial savings in transaction costs for negotiating and administering collective bargaining agreements.[6] For the unions, multi-employer bargaining has two main disadvantages: (i) the effectiveness of whipsaw strikes and other whipsaw tactics is eliminated or greatly diminished by employers' ability to use concerted defensive weapons, and (ii) employers may concertedly use the same weapons offensively in the bargaining process.

The employers also benefit to some extent from increased efficiency attributable to standardization of terms and conditions and from savings in transaction costs. Their primary and overriding benefit, however, is from

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[6] Additional advantages of multi-employer bargaining to unions generally are discussed in *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 409 n.3 (1982); Jan Vetter, *Commentary on "Multiemployer Bargaining Rules": Searching for the Right Questions*, 75 Va. L. Rev. 285 (1989).

the ability to use economic weapons in concert. For them, the principal disadvantage is that the unions can shut down the entire industry with a strike, and their power to do so is an ever-present factor in the bargaining.

Finally, in the motion picture industry, unlike professional sports leagues, there has been no litigation with respect to the use of economic weapons in a labor dispute. There is no judicial experience with the application of antitrust law to collective bargaining and labor relations generally in this industry.

II. THE POTENTIAL EFFECTS OF THIS CASE ON COLLECTIVE BARGAINING IN THE MOTION PICTURE INDUSTRY RAISE CONCERN.

If the decision below were rejected on a basis applicable to the motion picture industry, the framework for bargaining in that industry would be shattered in a way likely to lead to much more troubled labor relations. The likely result is erosion or elimination, from the employer side, of the multi-employer unit.

The Solicitor General's position is that the non-statutory exemption would terminate at impasse (or as soon as counsel can advise that impasse has been reached). Brief for the United States and the Federal Trade Commission as *Amici Curiae* Supporting Petitioners [hereinafter "S.G. Br."] 7. Thereafter, there would be no non-statutory exemption for any concerted action by the employers (other than renewed participation in negotiations). *Id.* at 18. Antitrust claims could be brought against employers not only for concerted unilateral imposition of terms (as occurred in this case), but also for concerted maintenance of the status quo, a concerted lockout (including a concerted defensive lockout in response to a whipsaw strike), and any other concerted use of an economic weapon offensively or defensively.[7]

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[7] The Solicitor General's position thus goes far beyond the position of Judge Wald, who would provide no exemption for concerted imposition of terms, but would apply the non-statutory exemption

Under the Solicitor General's view, once impasse is reached, the union could engage in whipsaw tactics and the employers could not respond with a defensive concerted lockout without risking treble damage liability for a *per se* antitrust violation. The union could also use or threaten whipsaw tactics to extract interim agreements from weaker employers, but the employers could not respond (without antitrust risk) with either concerted maintenance of the status quo or concerted unilateral imposition of terms; nor could an individual employer withdraw from the multi-employer unit and negotiate a separate permanent agreement.

Moreover, even while pursuing whipsaw tactics, the union could signal its readiness to resume bargaining. The employers would then have a duty to bargain concertedly. Each meeting of the employers in connection with the negotiations could be used by the union as further evidence of an alleged conspiracy. The employers' discussions at such meetings would arguably be subject to discovery in antitrust litigation brought by the union. The chilling effect on collective bargaining would be substantial.

Thus, the logic of the bargaining process would create an enormous incentive for a union to bargain to impasse, because then its economic weapons become much stronger and the employers' weapons much weaker (because no longer permissibly concerted).

Petitioners contend that the decision below would create the same kind of incentive on the employers' side to bargain to impasse to be able to impose terms uni-

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to concerted use of other economic weapons. *See* Pet. App. 53a n.7. Petitioners appear to be of two minds on this point. Their general position is that the non-statutory exemption is coextensive with a collective bargaining agreement, so that, without the consent of the union, there would be no non-statutory exemption for any use of an economic weapon by employers (before or after the reaching of impasse). *See, e.g.*, Pet. Br. 18. However, at Pet. Br. 40, petitioners endorse Judge Wald's position. *See also* Pet. App. 22a-23a (reference to petitioners' position below).

laterally. For two reasons, however, the situations of unions and employers are not symmetrical, and unions would have much stronger incentives and opportunity to bargain to impasse than would employers.

First, in most circumstances, a union's ability to use whipsaw tactics with a threat of an antitrust claim against any concerted employer defense is a more powerful weapon than the employers' ability concertedly to impose terms unilaterally.

Before impasse, employers could respond to a whipsaw strike or other whipsaw tactic by a concerted lockout or other concerted defensive action. After impasse is reached, however, any such action by the employers would risk antitrust liability, in most circumstances for an alleged *per se* violation. Thus, the threat of treble damage liability would strongly deter the employers from any concerted defense. The employers' principal advantage from multi-employer bargaining would thereby be destroyed.

The employers' option at impasse to impose terms offered to the union is, in general, not nearly so powerful. That option does not destroy any defenses: the union can still strike or use other tactics. Moreover, the option has value only if the terms offered are materially less generous than the status quo. In an economy characterized by increasing productivity and by inflation, employers' good faith offers to unions will, in general, be more generous than the status quo. Concerted unilateral imposition of such terms is not an economic weapon at all, except as a possible defensive response to a strike (in the hope that the more generous terms will attract the employees back to work).

Second, it would be easier for a union than for an employer to conceal a strategy of deliberately bargaining to impasse. Although unions (like employers) have a duty to bargain in good faith, as a practical matter a union could bargain to impasse on any of a variety of mandatory subjects of bargaining. The union could simply adhere to one or another apparently legitimate demand for improvement in pay or benefits or working

conditions. By contrast, the employers would have to (i) propose a term materially less generous than the status quo, and, probably, (ii) adhere to that proposal until impasse. In most circumstances, such conduct would be an obvious signal of bad faith. Employers whose overall bargaining strategy is to offer terms less generous than the status quo, with no reasonable basis for belief that the union would accept them, in order to drive the negotiations to impasse so that those terms could be imposed unilaterally, would very probably be found to have committed an unfair labor practice. *See, e.g.*, 1 Patrick Hardin (ed. in chief), *The Developing Labor Law* 625-27 (3d ed. 1992) (citing cases) [hereinafter "Hardin"]. In a multi-employer unit, moreover, multiple employers would have to agree on the strategy; and that agreement would be reflected in communications subject to scrutiny in a later unfair labor practice proceeding. Thus, it is more difficult for multiple employers, than for a single union, to conduct and to conceal an unlawful bargaining strategy. If any unfair labor practice is found, any unilateral imposition of terms is improper.[8] Thus, generally that would not be a viable strategy for employers.[9]

The Solicitor General's position threatens multi-employer bargaining for additional reasons. Even if employers act unilaterally during impasse, the employees are likely to have a non-frivolous basis for an antitrust claim based on (i) parallel conduct (because, under labor law, employers' options during impasse are limited to maintenance of the status quo, imposition of terms offered to the union, and lockout) and (ii) meetings among the employers, necessary for good faith concerted bargaining as required by labor law, at which the parallel conduct could have been agreed to. As a practical matter, simul-

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[8] See n.17, *infra*.

[9] Petitioners' analysis of incentives would apply, under current law, to an employer in a single-employer unit. It has not been thought, however, that the risk that individual employers will improperly bargain to impasse so as to be able to impose terms justifies a ban on unilateral imposition of terms.

taneous duties (i) under labor law to bargain concertedly, and (ii) under antitrust law to act individually would create an extraordinarily fertile field for antitrust claims.

If the bargaining process is punctuated by a series of impasses and resumed negotiations, the problems for employers are aggravated. The Solicitor General does not address whether, after the first impasse and while renewed negotiations are ongoing, the non-statutory exemption would immunize the employers' concerted use of economic weapons defensively or offensively. If the answer is that it would not, then the incentive for a union to reach impasse is increased, because then the first impasse ensures that the employers will be under an antitrust threat if they take any concerted action during any subsequent negotiations as well as during any impasse. If the answer is that the exemption would cover concerted use of economic weapons during resumed negotiations, then assessment of the antitrust risk becomes very complicated. Although the exemption turns on and off with the negotiations, any similarity in the employers' conduct during periods of impasse and periods of negotiation can be exploited in antitrust litigation.

Faced with the logic of the Solicitor General's position if it were adopted by this Court, employers in our industry are likely to conclude that the benefits of multi-employer bargaining no longer outweigh the risks. Without multi-employer bargaining, the employers would risk whipsaw tactics, but that risk would be present even with it once impasse is reached. The employers would give up the savings in transaction costs and whatever gains in efficiency they derive from standardization of terms and conditions; but those advantages probably would not outweigh the new and inescapable antitrust risks of multi-employer bargaining.

If Judge Wald's position were adopted, the results for multi-employer bargaining in our industry would be less severe, *see* pp. 29-30, *infra*, but still adverse. Unilateral concerted implementation of terms or concerted maintenance of the status quo—principal defenses against

whipsaw interim agreements—would carry antitrust risk.[10] The principal remaining concerted economic weapon to protect the bargaining unit from whipsaw tactics and bring the union back to the table would be a lockout—a more painful, and less desirable, weapon for all concerned.

In sum, in the realities of collective bargaining, the two sides of the issue presented here are not mirror images. In the vast majority of circumstances, whipsaw tactics and antitrust claims threaten the multi-employer unit in a way and to a degree that imposition of previously offered terms does not.

III. CONCERTED MULTI-EMPLOYER CONDUCT SOLELY AFFECTING A LABOR MARKET SUBJECT TO COLLECTIVE BARGAINING SHOULD BE GOVERNED BY LABOR LAW, NOT BY ANTITRUST LAW.

This case involves matters central to national labor policy, but, at most, peripheral to the antitrust laws. *See, e.g., United Mine Workers v. Pennington*, 381 U.S. 657, 664 (1965).

The NLRA establishes for employers and employees a comprehensive process for "the ordering of the parties' industrial relationship through the formation of a contract." *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 485 (1960). Multi-employer bargaining and employers' concerted use of economic weapons permitted by labor law in aid of bargaining are "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *NLRB v. Truck Drivers Local 449, Int'l Bhd. of Teamsters ("Buffalo Linen")*, 353 U.S. 87, 95 (1957). This Court in *Insurance Agents* got to the heart of the matter: "The presence of economic weapons in reserve and their actual exercise on occasion by the parties, is part and parcel of

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[10] The Solicitor General's comment that the rule of reason "may" protect such conduct, S.G. Br. 19 n.5, is small comfort to employers who face the risk of treble damages. Moreover, Congress did not intend antitrust juries to substitute for the NLRB in administering a code of conduct for labor relations.

the system that the Wagner and Taft-Hartley Acts have recognized." 361 U.S. at 489. As is illustrated by the experience of collective bargaining in our industry (since 1982: 175 negotiations, and 170 agreements without resort to economic weapons), the *availability* of the economic weapons, with only occasional use, generally is sufficient to drive the parties to agreement. That is how Congress intended the process to work.

In contrast, a labor market with a multi-employer collective bargaining process that affects only that market is peripheral to the antitrust laws because (i) there is no antitrust interest in competition among the employees, *e.g., Pennington*, 381 U.S. at 664 (citing *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 664 (1940)); and (ii) there is no antitrust interest in competition among the employers in the unionized labor market: [11] whether such competition is preserved, restricted, or eliminated depends entirely on the parties' collective bargaining agreement.[12]

This Court has never held that concerted multi-employer conduct that is permitted by labor law in the collective bargaining process and that directly affects only the labor market is subject to the antitrust laws; and it should not do so now.[13]

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[11] In both *Anderson v. Shipowners' Ass'n*, 272 U.S. 359 (1926), and *Radovich v. NFL*, 352 U.S. 445 (1957), there was no recognized union and no collective bargaining.

[12] *If* the collective bargaining agreement preserves any competition among the employers with respect to terms and conditions of employment, and *if* antitrust principles apply to such competition (a question not raised by the instant case), the applicability of antitrust law derives not independently from the decision of Congress to enact the law but from the decisions of the parties to the collective bargaining agreement (by virtue of power vested in them by the NLRA) to make the law applicable. Such a situation does not reflect an independent and strong antitrust interest in governing conduct in such markets.

[13] In the four cases in which the Court has considered the non-statutory exemption—*Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945); *Pennington*, 381 U.S. 657; *Local Union 1809, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965);

A. National Labor Policy Applies to, and the NLRA Adequately Governs, Employer Conduct in a Labor Market Subject to Collective Bargaining.

"The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace." *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962). "[T]he Act is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved." *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 680-81 (1981). Thus, petitioners' view of national labor policy as favoring employees and unions, Pet. Br. 19, is incorrect. Once employees' organizational and representational rights are protected, national labor policy is neutral as between employees/unions and employers.

Under national labor policy and the NLRA, once a group of employees have chosen a union to represent them, their employer is required to bargain with their union. The duty of the employer (as well as the union) is to bargain in good faith, albeit with no duty to reach agreement on particular terms. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970). "[T]he Act provides a *framework* for the negotiations; it 'is concerned primarily with establishing an *equitable process* for determining terms and conditions of employment.'" *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 616 (1986) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753 (1985)) (emphasis added).

The framework for this "equitable process" embraces the duty to bargain in good faith and the use of economic weapons in aid of bargaining positions. "[T]he use of

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and *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975)—the antitrust concern focused on an effect on a product market. In *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), the Court did not reach the claim presented under the exemption because it held that the union lacked antitrust standing.

economic pressure by the parties to a labor dispute is not a grudging exception . . . ; it is part and parcel of the process of collective bargaining." *Insurance Agents*, 361 U.S. at 495.

Thus, as a matter of labor law, each side has offensive and defensive economic weapons. Before or during impasse, a union can strike, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962); and an employer can respond by hiring permanent replacements. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938). Before or during impasse, a union can conduct a slowdown or peaceful harassing tactics; and an employer can respond by discharging employees who violate work rules. *Insurance Agents*, 361 U.S. at 493. During impasse, a union can seek an interim agreement; an employer can respond by unilaterally imposing terms it had previously offered to the union. *NLRB v. Katz*, 369 U.S. 736 (1962). Before or after impasse, an employer can lock out its employees and hire temporary replacements; *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown Food Store*, 380 U.S. 278 (1965); and a union can respond by picketing to publicize the labor dispute and signal others not to enter the employer's premises, *Thornhill v. Alabama*, 310 U.S. 88 (1940), and by seeking assistance from companies that do business with the employer (but not from their employees), *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964). All of these economic weapons are affirmatively permitted by national labor policy, in aid of resolution of labor disputes by collective bargaining.[14]

Indeed, this Court has held that, to the extent permitted by labor law, the use of economic weapons in aid of collective bargaining is a right guaranteed by national labor policy against regulation under other laws. " '[R]esort

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[14] Use of any of these weapons in a manner or for a purpose inimical to collective bargaining, is prohibited. *See, e.g., American Ship*, 380 U.S. at 308 ("[T]here is here no allegation that the employer used the lockout in the service of designs inimical to the process of collective bargaining.").

to economic weapons should more peaceful measures not avail' is *the right* of the employer as well as the employee . . . ." *Local 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 147 (1976) (footnote & citation omitted; emphasis added; alteration in original). When the Court referred to "the right," it was stating national labor policy, not state law. Similarly:

> In *Machinists* we reiterated that *Congress intended to give parties to a collective bargaining agreement the right* to make use of "economic weapons," not explicitly set forth in the Act, free of governmental interference. 427 U.S. at 150. "[T]he congressional intent in enacting the comprehensive federal law of labor relations" required that certain types of peaceful conduct "must be free of regulation." *Id.*, at 155. The *Machinists* rule creates a free zone from which all regulation, "*whether federal or State*," *id.*, at 153, is excluded.

Golden State Transit Corp. v. City of Los Angeles ("Golden State II"), 493 U.S. 103, 110-11 (1989) (footnote omitted; emphasis added; alteration in original).[15] "[T]he interest in being free of governmental regulation of the 'peaceful methods of putting economic pressure upon one another,' *Machinists*, 427 U.S. at 154, is a *right* specifically conferred on employers and employees by the NLRA." 493 U.S. at 112 (emphasis added). *See also id.* at 115 (Kennedy, J., dissenting) (agreeing that the interest in freedom from regulation originates in "Congress' intent to create the free zone of bargaining . . . described in *Machinists*").

Under labor law, impasse is *not* the end of the collective bargaining process, the bargaining unit, the duty to

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[15] Thus, petitioners' contention that the right to use economic weapons in the process of collective bargaining derives solely from state law, Pet. Br. 34-35, is incorrect. Whatever State law may provide, this is a right "implicit in the structure of the Act (as was the right to self-help upheld in *Machinists*)." *Livadas v. Bradshaw*, 114 S. Ct. 2068, 2075 n.11 (1994).

bargain, or the applicability of national labor policy and labor law. The collective bargaining *process continues*, albeit by immediate means other than negotiation, with a view to ultimate resolution by negotiation culminating in an agreement. The bargaining unit remains intact.[16] The duty to bargain survives, and can be activated by either side at any time. "[A]n impasse normally only suspends the duty to bargain, and changed circumstances may end the suspension." 1 Hardin at 696 (footnote omitted). National labor policy and labor law continue to apply, and continue to govern the conduct of labor and management, *during and after impasse* for the purpose of achieving agreement.[17] In sum, "[a]s a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'" *Bonanno*, 454 U.S. at 412 (quoting *Charles D. Bonanno Linen Service*, 243 N.L.R.B. 1093, 1093-94 (1979)).[18]

B. The Same National Labor Policy and Labor Law Principles That Apply to Single-Employer Collective Bargaining Units Also Apply to Multi-Employer Units.

These principles of labor law apply to both single-employer and multi-employer collective bargaining units.

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[16] For example, in the absence of unusual circumstances, impasse does not justify an employer in withdrawing unilaterally from a multi-employer unit. *Bonanno*, 454 U.S. 404.

[17] For example, after impasse is reached, an employer may not unilaterally implement terms better than those previously offered to the union. *Katz*, 369 U.S. at 745. The employer also may not unilaterally change any term that was not a subject of bargaining with the unions. *NLRB v. Intracoastal Terminal*, 286 F.2d 954 (5th Cir. 1961). If the impasse resulted from bad faith bargaining or an unfair labor practice on the part of the employer, the employer is prohibited from implementing any unilateral changes. *E.g.*, *NLRB v. Herman Sausage Co.*, 275 F.2d 229 (5th Cir. 1960).

[18] Thus, the Solicitor General greatly exaggerates the practical and legal significance of impasse, and would give it further significance that is contrary to national labor policy.

Multi-employer units have long been accepted by national labor policy. "[I]n many industries the multi-employer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *Buffalo Linen*, 353 U.S. at 95. This Court has identified maintenance of the stability of the multi-employer unit as a "proper and pre-eminent goal" of labor law. *Bonanno*, 454 U.S. at 419.

As is true in the motion picture industry, multi-employer bargaining, outside the context of professional sports leagues, is entirely consensual.

> Unlike other bargaining units, the multi-employer unit is *consensual*. . . . The formation of the unit must be entirely voluntary, the assent of the union having representative status also being required. The Board will not approve the creation of such a unit over the objection of any party, union or employer.

1 Hardin at 511. *See also Bonanno*, 454 U.S. at 412; *Detroit Newspaper Publishers Ass'n*, 372 F.2d 569.[19] As in our industry, employers and unions in other industries consent to multi-employer bargaining because it provides to both sides substantial benefits.

When parties conduct collective bargaining on a multi-employer basis, they do so under the same national labor policy and the same rules of labor law that would apply if they bargained employer by employer. In principle, in entering into multi-employer bargaining, neither the union nor the employers gain or lose any rights, protections, or duties under labor law. *Cf.* 1 Hardin at 508.

A multi-employer unit does, of course, introduce additional complexities. Stability of the employer in a single-

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[19] Professional sports leagues are atypical of the general run of multi-employer bargaining units because a league is a joint venture and, together with its member clubs, is in some respects a single joint employer. *See North Am. Soccer League*, 613 F.2d at 1382. Thus, in the setting of a league, multi-employer bargaining may not be consensual.

employer unit ordinarily is not a concern. A multi-employer unit, however, can become unstable due to divisions originating within the employer group or to use of whipsaw tactics by a union.[20]

Labor law addresses these risks adequately by prohibiting (i) employer withdrawal from the unit once the bargaining process has begun, *Bonanno*; and (ii) any "separate agreements that would permit either the union or the employer to escape the binding effect of an agreement resulting from group bargaining," *id.* at 415; and by permitting (iii) a concerted lockout and hiring of temporary replacements in defense against a whipsaw strike, *Buffalo Linen*; *Brown Food*; and, arguably from analogy to the law governing an employer in a single-employer unit,[21] (iv) concerted maintenance of the status quo or (after impasse) imposition of previously offered terms.[22]

C. Concerted Unilateral Imposition by Employers in a Multi-Employer Bargaining Unit of Terms They Previously Had Offered to the Union Is Protected by National Labor Policy as a Permissible Economic Weapon During Impasse.

This Court has recognized that, after impasse is reached, unilateral imposition of terms is just another economic weapon. *Bonanno*, 454 U.S. at 415-16 n.9. Petitioners' argument, Pet. Br. 34-37, that such action is simply a return to "backdrop rights" under state law and not use of an economic weapon fine-tuned by federal labor law, is incorrect.

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[20] " 'Whipsawing' is the process of striking one at a time the employer members of a multi-employer association." *Buffalo Linen*, 353 U.S. at 90 n.7. *See also Bonanno*, 454 U.S. at 421 n.1 (Burger, C.J., dissenting).

[21] Neither the Solicitor General nor petitioners contend that, in a multi-employer bargaining unit, the employers' concerted unilateral imposition during impasse of terms previously offered to a union is an unfair labor practice.

[22] Whipsaw interim agreements are permitted after impasse has been reached. *Bonanno*, 454 U.S. at 413.

Under the NLRA, an empoyer's background right to set the terms of employment disappears when a collective bargaining relationship is established; and it is not restored as long as that relationship continues—whether or not bargaining is actually occurring. *Cf. Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 22 n.15 (1987) (referring to "the basic fact that a nonunion employer is freer to set employment terms than is a unionized employer"). Labor law views any change in terms not as the mere operation of a business, but as the use of an economic weapon that may subvert both the union's role as representative of the employees and the overall process of good-faith collective bargaining. Precisely because it views the changing of terms as an economic weapon, labor law regulates it closely—just as it regulates strikes, lockouts, and other economic weapons.

Thus, an employer is prohibited by labor law from changing terms in a way that would undermine the union or the collective bargaining process. *See Katz*, 369 U.S. at 745; *Insurance Agents*, 361 U.S. at 485. In general, during negotiations, an employer must maintain the status quo, *Katz*, 369 U.S. at 743; and, in a multi-employer unit all the employers must do so. After impasse is reached, an employer's labor law right to impose terms unilaterally is limited to those previously offered to the union, *NLRB v. Crompton-Highland Mills*, 337 U.S. 217 (1949); and, in a multi-employer unit, the same rule presumably applies to concerted action by the employers, 1 Hardin at 508.

The NLRB and this Court long ago rejected the notion that economic weapons are limited to the strike and lockout. Both employers and unions can use economic weapons that are not mentioned in the NLRA but nonetheless are recognized by the NLRA.[28] *See, e.g., Insur-*

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[28] Petitioners argue, without support, that the unilateral imposition of terms is somehow outside the free zone for economic weapons because it is not "painful for *both* sides." Pet. Br. 36 (emphasis in original). Also not painful for both sides, however, are, *e.g.*, employees' slowdowns and other harassing tactics, (recog-

ance Agents; *Machinists*; *Bonanno*. Unilateral imposition of terms is simply one of the permitted forms of economic pressure (and less harmful to the employees than a lockout), which becomes available once the obligation to maintain the status quo disappears upon impasse. That it is part of the continued operation of a business does not distinguish it from other economic weapons, *e.g.*, hiring of replacement workers.

Petitioners assert that employers will bargain to impasse in order to impose terms indefinitely. Pet. Br. 41. Impasse, however, is almost always temporary; and almost all labor disputes end in agreement. After impasse is reached, it is economic pressure (by both unions and employers) that brings parties back to the bargaining table and to agreement.

In sum, unilateral imposition of terms during impasse is among the economic weapons permitted and protected by national labor policy and labor law.

D. A Labor Market Subject to Collective Bargaining Is Peripheral to Antitrust Law.

It is undisputed that the employer conduct challenged by petitioners affected only the labor market. Pet. App. 30a n.8. Therefore, the concerns about effects on product markets that underlie *Allen Bradley*, *Pennington*, and *Connell* are absent.

Historically, in the absence of alleged effects on product markets, there has been little antitrust interest in the conduct of parties in labor markets subject to collective bargaining. Apart from a small number of private cases involving professional sports leagues during the last twenty years or so, *see* Pet. Br. 22 n.13, during the 106

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nized as a permitted economic weapon in *Insurance Agents*, 361 U.S. at 490), employees' appeals to managements of companies doing business with an employer (recognized as a permitted economic weapon in *Teamsters v. Morton*, 377 U.S. 252, 259 (1964)), and employers' hiring of permanent replacements for economic strikers (recognized as a permitted economic weapon in *Belknap, Inc. v. Hale*, 463 U.S. 491, 500 (1983)).

years since enactment of the Sherman Act this has not been an area to whose governance antitrust has made a substantial contribution. In view of the long history and widespread use of multi-employer bargaining, *see* Pet. App. 25a-28a, the paucity of antitrust litigation in this area is strong evidence that it is peripheral to antitrust concerns.[24]

This historical record also reflects the fact that antitrust has little to contribute to the resolution of labor disputes. If applied to such a dispute, the antitrust impulse to promote consumer welfare by attacking supplier cartels would be blocked by the statutory exemption. *E.g., Apex Hosiery*, 310 U.S. at 504. If applied to a multi-employer bargaining unit, the antitrust impulse to promote economic efficiency by attacking a buyer cartel would be blocked by the employers' labor law duty to act in concert in the bargaining process. As the instant case illustrates, antitrust can function, at most, to readjust the relative bargaining power of employees and employers. In the end, the labor dispute would be resolved not by antitrust law but by a collective bargaining agreement; antitrust would be merely one factor influencing the terms of that agreement.

In this kind of market, antitrust would not protect or promote competition. In an industry without concerted restraints on employer competition for employees (*e.g.*, the motion picture industry), antitrust would not increase competition among employers. The employer "restraints" that would be attacked under the Sherman Act (*e.g.*, concerted lockouts) operate not against individual employees one by one or outside the context of negotiating a new contract, but rather only against the employees collectively and during a labor dispute in the context of collective bargaining. The "restraints" are simply weapons

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[24] *See* 1 Philip Areeda & Donald F. Turner, *Antitrust Law* ¶ 229d, at 202 (1978) ("Apart from the peculiarity of the sports case, the general propositions are clear enough. In a context where a union enjoys a collecitve bargaining immunity, the employer would normally enjoy the same immunity.").

in the economic warfare that is part and parcel of collective bargaining. They have no other function, purpose, or existence. Even in a sports league, antitrust would not directly increase competition. True, the employees might use their bargaining power (enhanced by an antitrust claim or by antitrust deterrence of concerted employer defenses against whipsaw tactics) to achieve *in the bargaining* increased competition among teams for players. They might instead, however, use that same power to bargain for, *e.g.*, higher minimum pay or better benefits. Any increase in competition would be directly attributable not to antitrust but to the bargaining goals of the parties.

Judge Wald's concern that a sports league's monopsony power might reduce the supply of talented athletes "to the detriment of consumers," Pet. App. 41a, is misplaced.[25] First, in this case, it is undisputed that no such

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[25] Petitioners and Judge Wald hypothesize that employers acting in concert are a collective monopsony and therefore are economically inefficient. This hypothesis is factually questionable outside a sports league; and, even as applied to a sports league, is incorrect as a matter of economic theory.

In many industries, *e.g.*, trucking, construction, sheet metal, multi-employer bargaining units commonly do not include all employers, and therefore do not have monopsony power.

Even where it is arguable, as in the case of a sports league, that the employers in the aggregate have monopsony power, there is no reason to believe the outcome of collective bargaining would be economically inefficient. The employers face a monopolist union; therefore, there is a bilateral monopoly. Under economic theory, in such a labor market, the quantity of labor demanded will be the same as it would be if the union and all the employers constituted a single firm, which set its demand for labor at the level that maximized its profit. In such a market the price of the labor, within certain bounds, is irrelevant to the quantity supplied because "price is *not* a rationing device under conditions of bilateral monopoly. Instead, it is just a means of dividing the profit between the two parties." Roger D. Blair & Jeffrey L. Harrison, *Monopsony* 116 (1993) (emphasis in original). The profit-maximizing quantity of labor depends not on the bargain between union and employers (within certain bounds), but on the size of the product market in which the employers participate. If, indeed,

effect occurred. Pet. App. 29a n.8. Therefore, on this record, Judge Wald's concern is speculative. Second, as the film "Hoop Dreams" illustrates, there is no shortage of young athletes aspiring to play in a professional sports league. The notion that current levels of compensation in professional team sports are artificially depressing the supply of talented athletes is implausible.[26] Third, more generally, and more importantly, where a union and employers consent to a multi-employer bargaining unit, under national labor policy the compensation for the employees in the unit is to be determined not by competition among the employers but by, or in accordance with, a collective bargaining agreement. National labor policy has no preference for setting compensation by competition among employers. A collective bargaining agreement may specify a procedure for determining compensation; that procedure may be competition; and that competition may be constrained by whatever restrictions the union and employers include in the agreement. Alternatively, and far more commonly, the agreement may specify levels of compensation and preclude wage competition altogether.

In sum, a labor market subject to collective bargaining is, at most, peripheral to antitrust law.

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the NFL is an economically significant monopoly, then it is very likely that the compensation of members of the NFLPA is above the economically optimal level and includes a share of the NFL's monopoly profit. Even without a bilateral monopoly, there is little chance that there will be any deadweight loss from monopsony in this market because labor is not fungible and employers will be able to discriminate to maximize economic efficiency. *See* Richard A. Posner & Frank H. Easterbrook, *Antitrust* 150 (2d ed. 1981).

[26] Moreover, it is far from clear that consumers are better served by a league that abolishes all restraints on free agency and as a result pays the highest competitive salaries and attracts the best athletes than by a league that retains some such restraints, pays somewhat lower salaries, attracts somewhat less talented athletes, but has more evenly-matched teams. Judge Wald's economic analysis (the more the players are paid, the better for consumers) cannot explain why some fans, faced with a choice, would prefer to watch college basketball or football rather than professional because they view it as a better game.

E. In a Labor Market Subject to Collective Bargaining, Conduct by Employers or Unions Directly Affecting Only the Labor Market Should Be Governed by National Labor Policy Rather Than by National Antitrust Policy.

Labor law and antitrust law are both about process, not economic results. Each dictates a particular kind of process for achieving results; neither dictates the results themselves.[27]

Labor law establishes a framework for the process of collective bargaining: organization of employees into unions; recognition of unions by employers; and, between unions and employers, negotiations backed by permitted economic weapons. That framework "is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole." *First Nat'l Maintenance Corp.*, 452 U.S. at 678; *see also American Ship*, 380 U.S. at 317. A principal function of unions is to eliminate competition over wages. *See Jewel Tea*, 381 U.S. at 692-93 (opinion of White, J.); *id.* at 711 ("[B]usiness competition based on wage competition is not national policy.") (opinion of Goldberg, J.).[28]

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1994), mandates competition as the process for economic effi-

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[27] Thus, contrary to the analogy drawn in S.G. Br. 23, labor law and antitrust law are quite different from the Fair Labor Standards Act and the Occupational Safety and Health Act, which are concerned not with the process by which substantive results (fair labor standards, workplace safety) are reached, but with the substantive results themselves.

[28] Petitioners' contention, Pet. Br. 33, that they have organized to preserve competition distorts reality. If all that petitioners wanted were competition, there would be no collective bargaining process. By choosing to organize and enter into such a process, petitioners seek the substitution of a collective bargaining agreement for a regime of unrestrained competition. The existence or non-existence of competition among the employers for the services of petitioners will be determined not by the antitrust laws but by the outcome of the bargaining process.

ciency and consumer welfare. Similarly, Section 2 of the Act, 15 U.S.C. § 2 (1994), bars actual and attempted monopolization, but not the acquisition of monopoly by "skill, foresight and industry." *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) (L. Hand, J.).

The two processes around which labor law and antitrust law, respectively, are organized are fundamentally different.

In the case of a multi-employer bargaining unit, labor law affirmatively permits the concentration of economic power on both the employee and employer side, directs that the two aggregates bargain in good faith, and authorizes them, in accordance with certain rules, to resort to concerted use of economic weapons to bring about ultimate agreement. National labor policy discourages resort to the courts to resolve labor disputes.[29]

The process dictated by antitrust law is competition. In the absence of the Clayton and Norris-LaGuardia Acts and the non-statutory exemption, if antitrust would apply to a labor market it would require competition among employees and competition among employers as the processes that would determine the terms and conditions of employment. Antitrust policy, moreover, encourages resort to the courts to resolve claims of antitrust violations. A fundamental problem with petitioners' position is that it would involve the courts in the forbidden task of balancing the economic power of employers and unions. Concerted behavior by a multi-employer group is part of the collective bargaining process protected by national

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[29] Originally, that policy was directed to protection of the organizational activities of employees from judicial interference. *See, e.g., United States v. Hutcheson*, 312 U.S. 219, 229-31 (1941). Subsequently, the policy was given broader scope. "While the Norris-LaGuardia Act's bar of federal-court labor injunctions is not explicitly phrased as an exemption from the antitrust laws, it has been interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes." *H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 714 (1981).

labor policy; antitrust actions are not. Where labor markets are subject to collective bargaining, courts should not be regulating labor relations or attempting to resolve labor disputes in those markets in the guise of applying the Sherman Act.

In the context of a labor dispute, the process called for by national labor policy and that called for by antitrust policy are not merely different, but competing. The Solicitor General argues they are not competing because, once impasse is reached, employers can comply with both labor law and antitrust law. S.G. Br. 17. In some circumstances, however, that is impossible. If each employer acts individually and continues to operate, it must choose either the status quo or terms offered to the union; and both may require concerted action that the employees would attack on antitrust grounds. An employer who sought to avoid antitrust liability by individually imposing terms less restrictive and therefore more generous than both the status quo and the multi-employer offer would commit an unfair labor practice.

More fundamentally, the test proposed by the Solicitor General is inappropriate. The appropriate test is whether national labor policy can be fulfilled if the non-statutory exemption does not encompass, but leaves subject to antitrust challenge, concerted resort by employers to economic weapons as permitted under labor law.[30]

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[30] The Solicitor General acknowledges that "the antitrust laws should yield to the more specific and later enacted, obligations of the NLRA" where the two conflict. S.G. Br. 16. The Solicitor General recognizes a conflict, however, only when the legally enforceable obligations the two laws impose on employers directly conflict. Thus, the logic of the Solicitor General's test would preclude immunity for employers' concerted use of economic weapons even before impasse, a consequence the Solicitor General does not propose. Moreover, the Solicitor General apparently does not recognize a conflict when the policies of the two bodies of law conflict or when the processes they require conflict. The Solicitor General's position is thus analogous to one that recognizes that a State law is preempted by a federal law when it imposes an obligation inconsistent with an obligation imposed by the federal law,

National labor policy cannot be fulfilled if employers in a multi-employer bargaining unit are subject to liability for concertedly making "use of economic pressure . . . [that] is part and parcel of the process of collective bargaining." *Insurance Agents*, 361 U.S. at 495. National labor policy embraces multi-employer bargaining units and protects the stability of such units. Such units will not be stable if, during impasse, employers risk antitrust liability if they respond to a whipsaw strike with a concerted lockout or if they respond to union efforts to obtain whipsaw interim agreements with concerted maintenance of the status quo or concerted imposition of terms. Nor is national labor policy fulfilled if employers, having entered into a multi-employer unit with the consent of the union, and having an ongoing duty to bargain concertedly, must risk antitrust liability if they concertedly resort to economic weapons permitted by labor law to advance their bargaining position. National labor policy requires that employers under a duty to bargain concertedly be able to support their bargaining with concerted use of economic weapons; antitrust law would strip employers of that ability.

Thus, although exemptions from the antitrust laws should be no broader than is "necessary to make the [conflicting statutory scheme] work," *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963), *cited in* S.G. Br. 13, here the minimum exemption necessary to make national labor policy work is an exemption for the process of collective bargaining, including resort to concerted use of economic weapons as permitted by labor law. National labor policy cannot be fulfilled if concerted conduct in the labor market that labor law treats as a right, *Golden State II*, 493 U.S. at 110-12; *Livadas*,

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but not when its provisions would frustrate implementation of the policy of the federal law. In the field of preemption, this Court has rejected such an approach. *See, e.g., Connell*, 421 U.S. at 635 ("The Court has held repeatedly that federal law pre-empts state remedies that interfere with federal labor policy or with specific provisions of the NLRA.").

114 S. Ct. at 2075 n.11, can be treated under antitrust law as a wrong.

IV. THIS COURT SHOULD NOT EXCLUDE THE CONCERTED LOCKOUT IN A MULTI-EMPLOYER BARGAINING UNIT FROM THE NON-STATUTORY EXEMPTION.

This Court should reject the Solicitor General's invitation to go beyond the facts of the case by holding that the non-statutory exemption does not protect *any* concerted employer conduct during impasse. S.G. Br. 17-26.

The Solicitor General, contrary to the position of Judge Wald in dissent, *see* Pet. App. 22a n.7,[31] would, after impasse is reached in a multi-employer bargaining unit, lump the concerted lockout and other concerted employer use of economic weapons with the concerted unilateral imposition of terms, and would subject them all to antitrust challenge. *Id.* at 18 n.5. That approach would conflict with "the proper and pre-eminent goal [of] maintaining the stability of the multiemployer unit." *Bonanno*, 454 U.S. at 419.

> [T]he ground rules for multiemployer bargaining have not come into being overnight. They have evolved and are still evolving, as the Board, employing its expertise in the light of experience, has sought to balance the "conflicting legitimate interests" in pursuit of the "national policy of promoting labor peace through strengthened collective bargaining." *Buffalo Linen*, 355 U.S. at 95, 96.

Id. at 413. Among the ground rules that the Board has established, and this Court has approved, is the right of employers in a multi-employer unit to resort to a concerted lockout. *See Buffalo Linen*, 353 U.S. at 97; *Brown Food*, 380 U.S. at 285 (allowing hiring of tem-

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[31] At least at some points in their brief, petitioners appear to agree with Judge Wald, rather than with the Solicitor General, on this issue. *See* n.7, *supra*.

porary replacements necessary to preserve "the right of lockout recognized by *Buffalo Linen*").

In *Bonanno*, this Court approved a Board rule that impasse was not a sufficiently significant or unusual circumstance to justify withdrawal by an employer from the multi-employer unit. *Bonanno* reflects a view not merely of impasse, but also of the relationship among the employers in such a unit after impasse is reached. The employers continue to be bound together even during impasse. *See id.* at 414.

Buffalo Linen and *Brown Food* each involved a concerted lockout before impasse, and *Bonanno* involved an attempt to withdraw from the multi-employer unit during impasse. Thus, none of these cases involved a concerted lockout during impasse. Nevertheless, the rationales underlying all three cases—protection of the stability of the multi-employer unit, legitimacy of resort to economic weapons in aid of collective bargaining—together with the relative insignificance of impasse in the overall collective bargaining process, support protection, under the non-statutory exemption, of the use of a concerted lockout as an economic weapon during impasse.

As this Court has recognized, whipsaw tactics can destroy a multi-employer unit. *Brown Food*, 380 U.S. at 283-85; *see also Buffalo Linen*, 353 U.S. at 96. The only effective defense, before or after impasse is reached, is concerted action by the employers. Therefore, the concerted lockout and other economic weapons necessary to preserve multi-employer units should be protected by the non-statutory exemption from antitrust attack.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,
Petitioners,

v.

PRO FOOTBALL, INC.,
WASHINGTON REDSKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether members of a multi-employer bargaining unit are subject to antitrust liability for jointly exercising, during the collective bargaining process, economic weapons authorized by the federal labor laws?

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

This Brief is submitted by the Chamber of Commerce of the United States of America (the "Chamber") and the National Association of Manufacturers ("NAM"), as *amici curiae* in support of respondents.[1]

INTEREST AS AMICI CURIAE

1. The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents approximately 220,000 businesses, trade and professional organizations and state and local chambers of commerce, and serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in important matters before this Court, the lower courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs in more than 300 cases of importance to the business community. Those cases include *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990); *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988); *Golden State Transit Corp. v Los Angeles*, 475 U.S. 608 (1986); *Connell Constr. Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975); and *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965).

2. The NAM is the nation's oldest and largest broad-based industrial trade association. Its nearly 14,000 mem-

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[1] The Chamber and the NAM have received the written consent of the parties to the proceeding below to file this Brief as *Amici Curiae*. Copies of these letters are on file with the Clerk of the Court.

ber companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85 percent of all manufacturing workers and produce over 80 percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council. The NAM has regularly participated in cases before this Court raising important labor relations and antitrust issues, including *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974); and *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

3. A substantial number of the members of both the NAM and the Chamber (collectively "the *amici*") engage in multi-employer and other forms of coordinated bargaining. Multi-employer bargaining in this country is "as old as the collective bargaining process itself," and dates to at least the eighteenth century. M. Derber, *Employers Associations in the United States* in *Employers Associations and Industrial Relations: A Comparative Study*, 79 (J.P. Windmuller & A. Gladstone eds., Oxford 1984). It is the dominant form of labor negotiations in many sectors of the economy, and is important on a national or regional basis in many others. Employer-members of the *amici* in the garment, transportation, printing and publishing, mining, retail, construction, maritime, retail food, restaurant, hotel, and building services businesses engage in multi-employer bargaining on a local, regional, or national basis.

4. The court of appeals below held that the non-statutory labor exemption to the Sherman Act insulates from antitrust liability economic self-help taken by members of a multi-employer bargaining association in the bargaining process once a bargaining impasse has been reached. This result, we believe, is required by the structure of the National Labor Relations Act and the decisions of this Court interpreting that statute, and is consistent with this Court's decisions accommodating the antitrust laws with conflicting statutory schemes.

5. The NLRA encourages the "practice and procedure of collective bargaining," 29 U.S.C. § 151, by creating a system of private industrial dispute settlement in which the parties themselves are able to structure their relationships without government supervision. The Court has been scrupulous in forbidding federal, state or local interference with this congressionally mandated "free play of economic forces," whether that interference has been sought by labor or management, recognizing repeatedly that the threat and use of economic weapons by management and labor are essential to the system of private governance upon which our labor laws are premised. This system is inconsistent with the proposition advanced here by petitioners and their *amici*—that post-impasse imposition of the terms of the employer's final offer in bargaining—action plainly privileged under the NLRA—can form the basis for an antitrust action in the federal courts. If petitioners are correct, virtually every multi-employer bargaining dispute is likely to be resolved in a federal court treble damage antitrust action, instead of being settled privately by the contending parties without government interference.

6. Limitations on the utility of multi-employer bargaining are of particular concern to some of the smallest members of the *amici*. The parties in this case participate in a highly visible and lucrative economic enterprise that could hardly be more different from the typical multi-employer bargaining unit. As this Court quite accurately noted nearly forty years ago, the process of multi-employer bargaining became more prevalent after the Wagner Act of 1935 as smaller employers "sought through group bargaining to match increased union strength." *NLRB v. Truck Drivers*, 353 U.S. 87, 94-95 (1957). For small-scale manufacturers and for small employers in the restaurant, hotel, retail and printing industries, for example, the mutual aid and protection found in group bargaining is not merely beneficial, but can be essential for economic survival. For these relatively small enterprises, the arguments advanced by the petitioners and their *amici* pose particularly dire consequences.

STATEMENT

1. The professional football teams of the National Football League ("NFL") engage in collective bargaining with their players through a multi-employer bargaining association called the National Football League Management Council ("Management Council"). The players are represented in bargaining by the National Football League Players Association ("NFLPA" or "Union").

In 1989, the Management Council proposed to the NFLPA that each club in the league be permitted to establish a "developmental squad" for the purpose of retaining and training promising but inexperienced players who were not skilled enough to make the regular team rosters. The Management Council proposed that these players be paid at a uniform rate of $1000 per week.

Although the NFLPA was willing—indeed eager—to agree to the development squad concept, it adamantly refused to bargain with the Management Council on the subject of a collective wage rate for the players on such a squad. The NFLPA candidly told the Management Council that "all players, including developmental, should have the right to negotiate salary terms, *and no fixed wage for any group is acceptable to the NFLPA*." Pet. App. 7a (emphasis added.) Although the Management Council again tried to engage the NFLPA in negotiations over a collectively-bargained wage structure for the new developmental squads, *id.*, the NFLPA's intractable, institutional objections to collectively bargained wage rates soon produced an impasse.

The Management Council announced that in light of the bargaining impasse, it would implement unilaterally the offer it had made to the Union. Neither the petitioners nor the NFLPA filed an unfair labor practice charge with the National Labor Relations Board ("NLRB") challenging the right of the Management Council to take this action under the labor laws; indeed, it appears that the petitioners and their *amici* concede that the actions of the Manage-

ment Council were entirely consistent with the clubs' collective rights and obligations under the NLRA. Rather, the petitioners, a group of developmental squad players subject to the $1000 wage rate, filed this action under Section 1 of the Sherman Act against the NFL and each of the clubs challenging the Management Council's unilateral implementation of terms as an unlawful restraint of trade.

2. a. The clubs filed a motion for summary judgment in the district court, arguing that their concerted conduct was immunized from antitrust challenge by the so-called "non-statutory" labor antitrust immunity or exemption. The district court denied this motion, and granted petitioners' competing motion for summary judgment on this question. The district court found that the non-statutory exemption immunized the *product* of collective bargaining, *i.e.*, the agreement itself, but "question[ed] the wisdom" of applying the exemption to bargaining tactics adopted by a multi-employer association in the course of bargaining after the expiration of the previous agreement. Pet. App. 72a.[2] Opining that the procedures established by the NLRA for fostering successful collective bargaining negotiations had proven ineffective, the court concluded that the NLRA's bargaining procedures could profitably be supplemented with the spectre of antitrust liability: "The certainty that treble damages under the antitrust laws would attach after a date certain [to collective action by an multi-employer bargaining association] would create the atmosphere of economic certainty and urgency necessary for the parties to negotiate seriously and sign a new collective bargaining agreement." Pet. App. 73a-74a. The court subsequently found that the Management Council's action was a *per se* violation of the Sherman Act and, after a trial on damages, awarded petitioners

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[2] The district court thus also decided that under the Sherman Act, absent explicit Union permission, the clubs were prohibited from giving continuing effect to the terms of the expired collective bargaining agreement. Pet. App. 72a-80a.

$30.35 million in damages and attorneys' fees of $1.745 million. Pet. App. 9a.

b. The United States Court of Appeals for the District of Columbia Circuit reversed. In a panel decision written by Chief Judge Edwards, the court of appeals recognized that the fundamental goals of the Sherman Act and the later-enacted NLRA are, in important respects, antithetical to one another. The Sherman Act, the court noted, proscribes agreements in restraint of trade in order "to promote the national interest in a competitive economy." Pet. App. 3a, quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985). Conversely, the NLRA "contemplates collusive activity on the parts of both employees and employers," and was intended by Congress to foster agreements which collectively fix the price of labor in a particular company, or, in the multi-employer context, for employers throughout a given industry within a particular region or on a national basis. Pet. App. 3a, 25a.

Accommodating these disparate goals, the court of appeals carefully reviewed the system of private industrial governance embodied in the NLRA. As the court explained, the NLRA's obligation to bargain in good faith "is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole." Pet. App. 17a, quoting *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 678 (1981). Because the availability of these "economic weapons" is a predominant feature of collective bargaining under the NLRA, the court properly concluded that imposing antitrust liability on a multi-employer bargaining association for using those weapons—conduct that is unquestionably privileged under the NLRA—"would both subvert national labor policy and exaggerate federal antitrust concerns." Pet. App. 29a. To accept the district court's rule, the court held, would be to hold "that hard bargaining by employers with unions violates the Sherman Act." *Id.*, quoting M. S. Jacobs & R. K. Winter, Jr., *Anti-*

trust Principles and Collective Bargaining By Athletes: Of Superstars In Peonage, 81 Yale L. J. 1, 27 (1971).

Finding that this Court's decisions had not definitively addressed the scope of the non-statutory exemption, Pet. App. 14a-15a, Chief Judge Edwards concluded that "the exemption must be broad enough . . . to shield the entire collective bargaining process established by federal law," Pet. App. 16a, and that "the nonstatutory labor exemption waives antitrust liability for restraints on competition imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining." Pet. App. 29a.

c. Judge Wald dissented. Although apparently agreeing that the non-statutory exemption should protect the bargaining process, Judge Wald distinguished between "terms" of employment and 'tactics" of bargaining, finding that only the latter deserved antitrust protection. Pet. App. 50a-51a. While recognizing that post-impasse unilateral imposition "may qualify" as an economic pressure tactic intended to produce agreement, *citing American Ship Building v. NLRB*, 380 U.S. 300, 316 (1965), Judge Wald nonetheless rejected that possibility and concluded as a matter of law that unilateral implementation "is best understood not as a 'bargaining tactic' but as part of the employer's residual right to continue operating as dictated by business necessity once her statutory duty to bargain has been exhausted." Pet. App. 51a. Judge Wald concluded that bargaining ceases at impasse and therefore "at the point of impasse—when an agreement is no longer in sight or even being sought—immunity from antitrust liability for terms employers unilateraly impose should terminate." Pet. App. 60a.[3]

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[3] To our knowledge, no party in this case has addressed, below or in this Court, whether a multi-employer bargaining association is a single economic unit beyond the reach of Section 1 of the Sherman Act, which applies only to contracts, combinations or agreements in restraint of trade between separate entities. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). The

SUMMARY OF ARGUMENT

As the United States and the Federal Trade Commission (collectively referred to as "the United States" or "the Government") concede in their brief, if "there is a conflict between the labor laws and the antitrust laws such that both cannot be given full effect, the antitrust laws should yield to the more specific, and later enacted, obligations of the NLRA." Brief of the United States and the Federal Trade Commission as *Amici Curiae* Supporting Petitioners ("U.S. Br.") at 16-17. Application of the antitrust laws to the conduct at issue in this case would drive multi-employer bargaining disputes into the federal courts, thus frustrating fundamental precepts of national labor policy.

The federal labor laws authorize collective action by both labor and management to fix prices in the labor market, conduct that, absent exemption or immunity, normally would be illegal under the antitrust laws. The Court has repeatedly recognized that this inherently collusive and anti-competitive system of industrial dispute settlement created by Congress in 1935 can function only if the parties are free to act in their own self-interests and settle

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National Labor Relations Board has always "regarded . . . a multi-employer bargaining group . . . as *the employer for bargaining purposes.*" *Burgess Mining & Constr. Corp.*, 239 N.L.R.B. 92, 93 (1978) (emphasis added); *Shipowners' Ass'n of the Pacific Coast*, 7 N.L.R.B. 1002 (1938), *rev. denied on other grounds*, 103 F.2d 933 (D.C. Cir.), *aff'd*, 308 U.S. 401 (1940). Thus, for the limited purposes of negotiating with a common union, the members of an employer group form a single economic enterprise. Under these circumstances, it makes little sense to treat the members of the multi-employer group as disparate economic actors. *Cf. Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 356 (1982) ("[i]n . . . joint ventures, the partnership is regarded as a single firm competing with other sellers in the market"); *Williams v. I.B. Fischer Nevada*, 999 F.2d 445 (9th Cir. 1993) (Section 1 violation impossible where franchisor and franchisee form a single economic unit); *Mount Pleasant v. Associated Elec. Co-op*, 838 F.2d 268 (8th Cir. 1988) (members of rural electrical co-operative were single economic unit even though each was separately incorporated).

their disputes privately, without interference by any governmental authority. The Clayton Act's express exemption for union collective action, as well as the so-called "non-statutory exemption" at issue here, seek to harmonize the conflicting policies underlying the federal labor and antitrust laws by preserving a broad sphere within which both management and labor can act without legal interdiction under the Sherman Act.

Petitioners and their *amici*, while supposedly acknowledging the primacy of the collective bargaining process, in fact ask the Court to undercut this dispute resolution system by authorizing recourse to federal antitrust laws in the midst of labor disputes involving multi-employer associations. Their various claims—that management's right to impose the terms of its final offer following a bargaining impasse is a mere "common law" rather than federal statutory right, or that all "restraints of trade" contained in a bargaining agreement must be eliminated when the contract expires or an impasse is reached—all are founded on serious misconceptions about the bargaining process contrary to the teachings of this Court. If adopted by the Court, the rules petitioners posit would make commonplace federal court involvement in the give-and-take of multi-employer collective bargaining, something Congress plainly did not intend.

Petitioners and their *amici* apparently believe that organized labor should be free to agree to bargain on a multi-employer basis, reaping the benefits of union collective action by fixing wages and benefits on a broad scale, while at the same time denying the employers in a lawful competing association correlative rights to unit-wide self-defense. This transparently partisan reading of the non-statutory exemption would destroy multi-employer bargaining, is wholly inconsistent with federal labor policy and should be rejected by this Court.

ARGUMENT

I. THE BARGAINING PROCESS MUST BE INSULATED FROM ANTITRUST LIABILITY IF IT IS TO FUNCTION AS ENVISIONED BY CONGRESS

A. The Labor and Antitrust Laws Serve Irreconcilable Goals

"The purpose and effect of every labor organization is to eliminate competition in the labor market." A. Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 242, 254 (1955). Thus, trade unionism cannot be effective in achieving its principal goals "unless organization is co-extensive with the market and eliminates price competition based on differences in labor standards." *Id.* at 276, citing S. Webb & B. Webb, *Industrial Democracy* (1902); *see also Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503 (1940) ("an elimination of price competition based on differences in labor standards is the objective of any . . . labor organization").

These goals are antithetical to the central mission of the Sherman Act—"to promote the national interest in a competitive economy." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985). Nearly 90 years ago, this Court held that the Sherman Act "prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business." *Loewe v. Lawlor*, 208 U.S. 274, 293 (1908). And, until Congress passed the Clayton Act in 1914, the courts routinely held that labor unions were just this sort of combination in restraint of trade. *Id.; United States v. Debs*, 64 F. 724 (C.C.D. Ill. 1894), *aff'd on other grounds*, 158 U.S. 564 (1895).

The Clayton Act was a direct response to cases such as *Loewe*, and it explicitly excepted labor organizations from the scope of the Sherman Act's proscriptions. The Clayton Act's statutory exemption, however, did "not ex-

empt concerned action or agreements between unions and nonlabor parties." *Connell Constr. Co. v. Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616, 622 (1975); *cf., Teamsters Local 167 v. United States,* 291 U.S. 293 (1934) (Clayton Act was not intended to immunize price-fixing agreement between union and businesses). Because every collective bargaining agreement is, by definition, such an agreement, application of the statutory exemption in the Clayton Act could not alone reconcile the intent of the antitrust laws with the aspirations of the 1935 Wagner Act—to foster "the practice and procedure of collective bargaining." *See* Section 1 of the NLRA, 29 U.S.C. § 151.

For this reason, in a series of decisions issued during the past 30 years,[4] this Court has created a non-statutory antitrust exemption designed to accommodate the federal policy of encouraging collective bargaining. As the majority below correctly observed, each of the Court's prior cases involved the scope of protection to be afforded a collective bargaining agreement. Pet. App. 13a-14a. From this, and from dicta found in these decisions discussing the need to protect collective bargaining agreements from antitrust challenge, petitioners and their *amici* unjustifiably conclude that the protections of the non-statutory exemption do *not* shield the bargaining *process,* but instead must be limited to collective bargaining *agreements.* This wooden and cramped reading of the non-statutory exemption fails to appreciate the central importance of the bargaining process and, in practice, would result in subverting congressional intent by forcing multi-employer labor disputes into antitrust litigation rather than resolving them through bargaining.

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[4] *See Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616 (1975); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965); *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676 (1965).

B. The Process of Collective Bargaining Depends Upon the Ability of the Parties to Use the Forms of Self-Help Petitioners and Their Amici Seek To Proscribe

When it enacted the Wagner Act in 1935, Congress created a private dispute resolution mechanism through which management and labor could "establish . . . their own charter for the ordering of industrial relations." *Teamsters Local 24 v. Oliver*, 358 U.S. 283, 295 (1959). Rather than compelling agreement or prescribing some form of binding arbitration, Congress envisioned that under the Act "[d]isputes about wages, hours of work, and other working conditions [w]ould . . . be resolved by the play of competitive forces . . . ." S. Rep. No. 573, 74th Cong., 1st Sess., 2 (1935), *cited in Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 617 (1986) ("*Golden State I*").

Thus, "economic weapons in reserve, and their actual exercise on occasion by the parties [were intended to be] part and parcel of the system that the Wagner and Taft-Hartley Acts recognized." *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 489 (1960). Indeed, often "it [is] only fear of the economic consequences of disagreement that turns the parties to facts, reason, a sense of responsibility, a responsiveness to government and public opinion, and moral principle." *Id.* at 489-90. For this reason, the "use of economic pressure by the parties to a labor dispute is not a grudging exception [under] . . . the [federal] Act," but an essential attribute of the system of private dispute resolution Congress devised. *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Rel. Comm'n*, 427 U.S. 132, 149 (1976) ("*Machinists*") (quoting *Insurance Agents' Int'l Union*, 361 U.S. at 498).

Given the potential for pain inherent in the use of these economic weapons, however, it is not surprising that both management and labor repeatedly have sought refuge from their labor disputes in federal, state, and local regulatory schemes. In *Insurance Agents*, the employer asked the NLRB and this Court to condemn a work slowdown. In

American Ship Building Co. v. NLRB, 380 U.S. 300 (1965), *NLRB v. Brown*, 380 U.S. 278 (1965), and *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87 (1957) ("*Buffalo Linen*"), labor asked the NLRB and this Court to limit the right of employers to lock out their employees in a variety of situations. In *Machinists*, the employer obtained an order from a state labor relations commission condemning a concerted refusal to work overtime. And in *Golden State I*, at union request, the city council terminated the employer's license to do business when the company failed to acquiesce in the union's bargaining demands.

But in each instance, this Court concluded that the system of private dispute settlement could not work if the agencies of government could be enlisted as an ally in the economic arena, thereby directly or indirectly dictating the shape of the bargain. "Although the labor-management relationship is structured by the NLRA, certain areas intentionally have been left 'to be controlled by the free play of economic forces.' The Court [has] recognized . . . that 'Congress has been rather specific when it has come to outlaw particular economic weapons, and that Congress' decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance 'between the uncontrolled power of management and labor to further their respective interests.' " *Golden State I*, 475 U.S. at 614 (internal citations omitted). Within this realm of economic self-help, Congress intended that the parties be left "unrestricted by *any* governmental power to regulate." *Machinists*, 427 U.S. at 141 (emphasis in original). This rule of law "creates a free zone from which all regulation, 'whether federal or state' is excluded." *Golden State Transit Corp v. Los Angeles*, 493 U.S. 103, 111 (1989) ("*Golden State II*") (internal citation omitted.[5]

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[5] This Court's protection of the bargaining process also is evidenced in cases where the Court has been willing to tolerate the

The narrow reading of the non-statutory exemption advanced by the petitioners and the United States simply cannot be reconciled with these cases, or with these most basic precepts of federal labor law. Petitioners and the United States argue that employers' choice of economic weapons may become the substance of a federal treble damages suit even though those weapons, under the decisions of this Court and the NLRB, lie in the "free zone" from which all regulation is excluded. Indeed, it is quite apparent that petitioners are not interested in having the bargaining process work as Congress envisioned it, but seek a *substitute* for that process. In their brief, petitioners complain that, absent an antitrust action, an employer's implementation of terms could force a union to "take the risk of calling a strike . . . ." Pet. Br. 42. Of course, the NLRA was predicated on the threat and use of such weapons, and not on resort to federal litigation as a substitute for economic muscle. "[T]he Act . . . does not contemplate that unions will always be secure and able

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imposition of certain minimum labor standards under state law. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985). These cases do not suggest, as petitioners maintain, that the antitrust laws should be read to condemn forms of self-help specifically authorized in the NLRA's bargaining scheme. Pet. Br. 27-30. As this Court explained in *Fort Halifax*, "the NLRA is concerned with ensuring an equitable bargaining process, not with the substantive terms that may emerge from such bargaining. 'The evil Congress was addressing [in passing the Wagner Act] was entirely unrelated to local or federal regulation establishing minimum terms of employment.'" 482 U.S. at 20 (quoting *Metropolitan Life Ins. Co.*, 471 U.S. at 754). Thus, when a state exercises its traditional police powers to "establish[] a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act." *Id.* at 21 (quoting *Metropolitan Life Ins.*, 471 U.S. at 757). In this case, by contrast, petitioners argue that the Sherman Act should be read to regulate directly the "equitable bargaining process" the NLRA was enacted to ensure. Unlike minimum labor standards, which are clearly subject to the traditional police powers of the state, the use of self-help lies in a "free zone from which all regulation 'whether federal or State is excluded.'" *Golden State II*, 493 U.S. at 111 (quoting *Machinists*, 427 U.S. at 153).

to achieve agreement even when their economic position is weak, or that strikes and lockouts will never result from a bargaining impasse. It cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107-08 (1970). Petitioners' preference for the litigation model over the bargaining model speaks eloquently of the manner in which they seek to "accommodate" the purposes of the two statutory regimes.

C. Post-Impasse Implementation of an Employer's Final Offer Is a Form of Economic Self-Help, Part of the Bargaining Process, and an Indispensable Tool for Forging Agreements

Because self-help plays an indispensable role in the operation of federal labor policy, petitioners are forced to concede that the antitrust laws do not, and should not, be applied to the collective bargaining process. Pet. Br. 40. Thus, they agree that even after contract expiration and impasse, the members of a multi-employer association may agree to hire replacement workers or lock out their employees—concerted actions in plain restraint of trade—without fear of antitrust liability. *Id.* They and their *amici* thus are forced to claim that post-impasse implementation of terms is qualitatively different from other bargaining weapons. No such difference exists.

• *"Terms" versus "Tactics."* The distinction advocated by Judge Wald below between immunized "tactics" and the "implementation of terms," recharacterized by petitioners here (*see* Pet. Br. 36), has been repudiated repeatedly by the NLRB, both in its decided cases and in representing its views to this Court.[6] In its brief in this

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[6] The Board's view on this point is authoritative. Congress "intended to leave to the Board's specialized judgment the resolution of conflicts between union and employer rights that [are] bound to arise" in the future. *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 409 (1982) (*"Bonanno Linen"*); *Buffalo Linen*, 353 U.S. at 96. In particular, balancing the various inter-

Court in *Bonanno Linen*, the NLRB recounted its experience with employer implementation:

> [I]mpasse permits the employer to place into effect those wage increases or benefits it has heretofore offered, an action (or the possibility of it) which may substantially shift the bargaining positions of the parties. *In [this use] of impasse as a bargaining tactic, the emphasis is toward achieving agreement rather than causing a permanent disruption in the relation.*

Brief for the National Labor Relations Board in *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 80-931 (Oct. Term 1980) at 22 (emphasis added; internal citation omitted).[7]

The Board's cases confirm that implementation of terms is an indispensable part of the bargaining process, intended to spur agreement, not to act as a substitute for it. In *Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22 (1973), *enforcement denied on other grounds, NLRB v. Hi-Way Billboards, Inc.*, 500 F.2d 181 (5th Cir. 1974)—the decision which established the rule subsequently endorsed by this Court in *Bonanno Linen*—the Board noted that

> Once a genuine impasse is reached, the parties can concurrently exert economic pressure on each other: the union can call for a strike [, and] the employer can . . . make unilateral changes in working conditions if they are consistent with the offers the union has rejected . . . . *Such economic pressure usually breaks the stalemate between the parties, changes the*

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ests served by multi-employer bargaining and "assessing the significance of impasse and the dynamics of collective bargaining [are] precisely the kind[s] of judgment[s] [this Court] ruled should be left to the Board." *Bonanno Linen*, 454 U.S. at 413.

[7] Given the NLRB's prior representations to this Court, it is perhaps not surprising that the Board did not sign the United States' brief in this case, contenting itself with a cryptic expression of its views in an ambiguous and highly unusual footnote on the final page of the brief. U.S. Br. 27 n.10.

circumstances of the bargaining atmosphere, and revives the parties' duty to bargain.[8]

206 N.L.R.B. at 23 (footnotes omitted and emphasis added). Petitioners' assertion that implementation of terms is "principally designed" as a "one-sided substitute for a bargaining agreement" "rather than to influence the bargaining process," Pet. Br. 36, is thus at odds with established labor law principles.

We do not disagree that some unscrupulous employers might approach bargaining intent on avoiding agreement, and manipulate the bargaining process in order to impose terms, following impasse, that are predictably unacceptable to the union. This conduct, however, constitutes surface bargaining forbidden by the NLRA, conduct that the NLRB can fully remedy. *See H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107-08 (1970); *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 741 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951); *Lapham-Hickey Steel Corp.*, 294 N.L.R.B. 395 (1989), *enf'd*, 904 F.2d 1180 (7th Cir. 1990). It would be a serious error to interpret the antitrust laws on the assumption that some employers might act unlawfully where Congress has already outlawed that conduct and set in place a mechanism for obtaining a remedy.

Moreover, unions have a powerful economic weapon for dealing with such conduct—an unfair labor practice strike. This type of strike is an especially potent weapon because the employer cannot permanently replace the

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[8] *Accord Circuit-Wise, Inc.*, 309 N.L.R.B. 905, 921 (1992); *R.A. Hatch Co.*, 263 N.L.R.B. 1221, 1234 (1982); *Presto Casting Co.*, 262 N.L.R.B. 346, 354 (1982), *modified on other grounds*, 708 F.2d 495 (9th Cir. 1983), *cert. denied*, 464 U.S. 994 (1983); *Signatory Labor Committee of the Colo. Contractors' Ass'n*, 261 N.L.R.B. 1459, 1465 (1982); *see also Colorado-Ute Elec. Ass'n v. NLRB*, 939 F.2d 1392, 1404-05 (10th Cir. 1991) ("the employer may try to achieve the wage terms it desires by using its economic weapon of implementing at impasse"; the employer's "right to implement at impasse [is] one of its powerful tools for achieving its wage terms"), *cert. denied*, 504 U.S. 995 (1992).

striking employees, and they are entitled to backpay under appropriate circumstances. *See generally NLRB v. International Van Lines,* 409 U.S. 48, 50-51 (1972); *Orit Corp.,* 294 N.L.R.B. 695, 698 (1989), *enf'd mem.* 918 F.2d 225 (D.C. Cir. 1990). Even more important, many multi-employer bargaining associations are composed of small employers who share an economic position simply too precarious to withstand a significant strike by a powerful union. In this regard, the powerful professional sports leagues and the entertainment industry are not typical of the majority of employers in multi-employer associations, a form of bargaining that allows smaller individual employers to pool their economic power to combat large and powerful labor unions. *See Buffalo Linen,* 353 U.S. at 94-95. In such circumstances, far more prevalent than the sports leagues and the entertainment industry, an unfair labor practice strike alone is an overwhelming deterrent to improper manipulation of the bargaining process.

• *Impasse.* The United States here, and Judge Wald below, commit a similar error by positing that impasse concludes bargaining and thus places the implementation of terms outside of the bargaining process. The NLRB's traditional definition of impasse, previously endorsed by this Court,[9] is flatly contray to this view. The NLRB repeatedly has made clear that impasse does not result in a fundamental alteration of the relationship between the parties or a termination of the bargaining process. Rather, impasse is

> akin to a hiatus in negotiations. In the overall ongoing process of collective bargaining, it is merely a point at which the parties cease to negotiate and often resort to forms of economic persuasion to establish the primacy of their negotiating position. Moreover,

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[9] "As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'" *Bonanno Linen,* 454 U.S. at 412 (quoting *Charles D. Bonanno Linen Serv., Inc.,* 243 N.L.R.B. 1093, 1094 (1979)).

> the occurrence of a genuine impasse cannot be said to be an unexpected, unforeseen, or unusual event in the process of negotiations . . . . Therefore, it is clear that an impasse is but one thread in the complex tapestry of collective bargaining, rather than a bolt of a different hue. *In short, a genuine impasse is not the end of collective bargaining . . . . [I]t is merely a momentary eddy in the flow of collective bargaining.*

Hi-Way Billboards, Inc., 206 N.L.R.B. at 23 (emphasis added); *see also Worldwide Detective Bureau*, 296 N.L.R.B. 148, 155 (1989) ("existence of an impasse does not insulate a party from the duty to bargain. When an impasse is reached, the duty to bargain is not terminated but only suspended." (footnote omitted)). As this Court has recognized, "in almost all cases [impasse] is eventually broken, through either a change of mind or the application of economic force." *Bonanno Linen*, 454 U.S. at 412. Petitioners, their *amici*, and the United States (and Judge Wald below) all err by asserting that impasse ends bargaining; instead, impasse is simply one more step down the road to an agreement. That road should not lead to the federal courthouse.[10]

• *Common Law versus Statutory Rights.* Finally, peittioners claim that unilateral implementation is outside the bargaining process because it is "not a 'right' conferred and protected by the NLRA. It is simply an exercise of

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[10] Indeed, if impasse signifies a conclusion of the bargaining process, the NLRB's continuing jurisdiction over the terms that an employer implements post-impasse could hardly be justified. It is undeniable, however, that under *NLRB v. Katz*, 369 U.S. 736 (1962), the Board *has* jurisdiction to ensure that the employer's post-impasse offers are consistent with its prior offers to the union. *Id.*, 369 U.S. at 745, 747 n.12. The purport of the *Katz* doctrine itself is that at impasse the duty to bargain is merely suspended and that neither the employer nor the union may take actions designed to frustrate the bargaining process or make agreement impossible. That is precisely what petitioners and their *amici* here would do, by placing the entire dispute at impasse in the hands of a federal court under an antitrust theory.

the employers' residual, common law rights to operate their businesses." Pet. Br. 34. Petitioners assert that because the right to implement "derives from the common law rather than the NLRA, subjecting the exercise of that right to the requirements of the Sherman Act presents no . . . conflict with . . . labor law . . . ." *Id.* at 35.

This claim is directly contradicted by the Court's decision in *Golden State II*, 493 U.S. at 112. There, the city had attempted to limit the taxi company's ability to "operate [its] business[]" by imposing a deadline on the resolution of the company's labor dispute with its union. When the employer did not meet the deadline, the city denied it the license necessary for it to stay in business. This Court explicitly held that "the interest in being free of governmental regulation of the 'peaceful methods of putting economic pressure on one another' *is a right specifically conferred . . . by the NLRA.*" *Id.* (footnote omitted and emphasis added). More particularly, this Court held that *the very right petitioners disparge here, i.e.*, an "employer['s] . . . right to operate [its] business[]" was a right conferred and protected by the NLRA, and that the city's attempt to interfere with that right was preempted by the NLRA. *Id.*[11]

In short, none of the various rationales offered by petitioners, their *amici* or Judge Wald below in any way

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[11] Petitioners' claim that this is a "common law" right, as opposed to a federal statutory right, appears to be premised on the lack of any explicit statutory reference to that right in the text of the Act. As this Court noted in *Golden State II*, 493 U.S. at 111-12,

> that might well also be said with respect to any number of rights or obligations that we have found implicit in a statute's language. A rule of law that is the product of judicial interpretation of a vague, ambiguous, or incomplete statutory provision is no less binding than a rule that is based on the plain meaning of a statute. The violation of a federal right that has been found to be implicit in a statute's language and structure is as much a "direct violation" of a right as is the violation of a right that is clearly set forth in the text of the statute.

establish that post-impasse unilateral implementation of an employer's final offer is either outside of the bargaining process or is in some character so unique as to be the proper subject of antitrust liability. If the non-statutory exemption is designed to protect the collective bargaining process, as petitioners properly concede, that protection must also extend to post-impasse implementation of an employer's final offer.

II. IMPLIED IMMUNITY FOR SELF-HELP BY MEMBERS OF AN EMPLOYER ASSOCIATION MUST BE AVAILABLE THROUGHOUT THE BARGAINING PROCESS

A. Application of Antitrust Immunity to the Bargaining Process Is Consistent With This Court's Antitrust Decisions

Contrary to the United States' contention, protection of the entire bargaining process under the non-statutory labor exemption does not conflict with this Court's other antitrust immunity opinions. The Court has regularly immunized conduct otherwise arguably prohibited by the Sherman Act whenever necessary "to make [a subsequent statutory process] work," as for example, when the second statutory regime establishes "a regulatory agency . . . empowered *to authorize* or require the type of conduct under antitrust challenge." *National Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross*, 452 U.S. 378, 389 (1981) (emphasis added) (quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963)). As the leading commentators in the antitrust field have explained, immunity must extend beyond the sort of direct conflict demanded by the United States to "conduct which the statute [here, the NLRA,] expressly or impliedly allows or assumes." P. Areeda & D. Turner, *Antitrust Law*, ¶ 224a at 145 (1978). The United States' contrary claim here —that an antitrust exemption is appropriate only when two statutes create an unavoidable conflict by requiring inconsistent actions—cannot be reconciled with the Court's holdings.

Indeed, the United States took a very similar posiiton, and was corrected by the Court, in *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975). There, the Court concluded that certain price-fixing agreements contained in the rules of the New York Stock Exchange ("NYSE") were immune from antitrust challenge because the NYSE had been authorized by the Securities and Exchange Commission ("SEC") to promulgate rules on the topic, and because the SEC exercised supervisory authority over the NYSE and its rules. The United States had argued that immunity was inappropriate because the specific kind of rule under review was not compelled by the SEC and thus was not "necessary to make [the competing statute] work." The Court held that a broader question was determinative: "[W]hether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by Congress." *Id.* at 688. Because the antitrust laws would condemn as *per se* violations the commission rates explicitly approved through the Exchange Act's system of "[s]upervised self-regulation," the Court held that immunity was appropriate. *Id.* at 691. *Accord United States v. National Ass'n of Securities Dealers*, 422 U.S. 694 (1975).

Under the appropriate legal standard, the case for implied immunity in this instance could hardly be more apparent. As this Court noted in *Buffalo Linen*, Congress has long recognized that multi-employer bargaining is "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." 353 U.S. at 95. The Court has also recognized that to foster this form of bargaining, Congress "intended to leave to the [NLRB's] specialized judgment the resolution of conflicts between union and employer rights that were bound to arise in multiemployer bargaining." *Bonanno Linen*, 454 U.S. at 409.

In pursuing this "vital" aspect of national labor policy, the NLRB has adopted rules which "reflect an increasing emphasis on the stability of multiemployer units." *Id.* at 410. Of particular significance in this case, the Board has

concluded that "it is precisely at and during impasse, when bargaining is temporarily replaced by economic warfare, that the need for a stable, predictable bargaining unit becomes acute in order that the parties can weigh the costs and possible benefits of their conduct." *Id.* at 410-12 and n.8. And to safeguard the integrity of the multi-employer unit, the Board (with the approval of this Court) has authorized the members of a multi-employer unit to take concerted self help to defend the integrity of the unit and to advance their concerted bargaining goals. Thus, this Court has explicitly approved unit-wide lockouts and the unit-wide use of temporary replacements. *See NLRB v. Brown,* 380 U.S. 278, 283-85 (1965) (multi-employer group may lawfully lockout employees on a unit-wide basis and replace them with temporary workers); *Buffalo Linen, supra.*

These are fundamental aspects of national labor policy, established by the NLRB and ratified by this Court. The United States however, *fails even to cite Buffalo Linen,* and it cites *Brown,* in a footnote, for the breathtaking proposition that while employers in organized sports may be able to defend activities similar to the lockout/replacement in *Brown* under a "rule of reason" test, for employers in other industries—presumably including the retail food business at issue in *Brown*—this conduct "would constitute a *per se* illegal concerted refusal to deal." U.S. Br. 18 n.5. Thus, the Government makes no attempt to reconcile its unprecedented attack on multi-employer bargaining with this Court's statement in *Brown* that the multi-employer group's unit-wide concerted self-help was "wholly consistent with a legitimate business purpose . . . [*i.e.*,] a measure reasonably adapted to the achievement of a legitimate end—preserving the integrity of the multi-employer unit." *Brown,* 380 U.S. at 285, 289 (footnote omitted). The position advocated by the United States would effectively disarm employers in this contest of economic wills, and thus disrupt the statutory scheme envisioned by Congress.

Indeed, the Government's insistence that implied immunity is appropriate only in instances of direct, unavoid-

able conflicts proves too much, because it would make the very existence of multi-employer bargaining groups illegal. Multi-employer bargaining is entirely voluntary; no employer is compelled to join a multi-employer association. Thus, an employer could comply with its NLRA obligations (by bargaining one-on-one with its union) *and* could simultaneously obey the Sherman Act's edict against agreements in restraint of trade *without* having to invoke an implied antitrust immunity. That the NLRA *authorizes* the existence of multi-employer groups—even encourages them as a "vital" aspect of national labor policy—should not, if the United States' view of implied immunity is correct, be sufficient to permit the inherently anticompetitive conduct of multi-employer bargaining. The United States' acknowledgment that multi-employer groups are lawful, and its concession that these employer groups can even engage in concerted conduct prior to impasse, must be read as a tacit admission that its asserted rule of direct conflict immunity is too restrictive.[12]

B. The Labor and Antitrust Rights of Employees Can Be Given Full Effect While Giving Employer Groups the Right To Act for Mutual Aid and Protection

The United States excoriates the majority below for assertedly requiring employees to chose between rights under the NLRA and those protected by the Sherman

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[12] Paradoxically, the position advocated by the United States, born of evident antipathy for concerted employer conduct, almost certainly would make such conduct more commonplace. Because employers in the multi-employer groups would know that at impasse they will be disabled from engaging in concerted self-selp, there would be an almost inexorable desire to use it *prior* to impasse, while fruitful negotiations are ongoing. In this setting, the Government's rule would act as a durational limit on the employers' self-help, something this Court explicitly condemned in *Golden State I*: "[t]he bargaining process was thwarted when the city in effect imposed a positive durational limit on the exercise of self-help . . . . The city's insistence on a settlement is pre-empted [because] the city [entered] into the substantive aspects of the bargaining process to an extent Congress has not countenanced." 475 U.S. at 615-16 (footnote and internal quote omitted).

Act. This claim overlooks the fact that multi-employer bargaining is entirely voluntary. No union is ever compelled to consent to it, and no employer (except during bargaining) can be held in a multi-employer group against its will. *Bonanno Linen,* 454 U.S. at 410-11; *Retail Assocs., Inc.,* 120 N.L.R.B. 388, 393 (1958); *see also Reliable Roofing Co.,* 246 N.L.R.B. 716 (1979); *General Ore, Inc.,* 126 N.L.R.B. 172 (1960).

Thus, members of a multi-employer bargaining unit are free to act in concert not by virtue of their employees' decision to organize, but by virtue of their union's voluntary decision to select the multi-employer bargaining form. Any claim to a non-statutory exemption would evaporate if the union chose not to bargain on a multi-employer basis. Petitioners, with the support of the United States, seek to reap the substantial benefits of multi-employer bargaining while simultaneously preventing employers from taking the forms of concerted self-help absolutely essential to maintaining the integrity of the multi-employer process. We believe unions choosing the benefits of multi-employer bargaining should shoulder the associated burdens, including the increased strength arrayed against them through concerted employer conduct.

A union's voluntary decision to continue multi-employer bargaining even with these burdens is not surprising. The multi-employer process poses numerous advantages for both labor and management. Unions benefit because negotiations on a multi-employer (or even industry-wide) basis can "minimiz[e] their organizational expenses, and increas[e] their security against raid[s] by outside organizations." *See* Brief for the National Labor Relations Board in *American Ship Building Co. v. NLRB,* 64-255 (October Term 1965) at 29. Multi-employer bargaining reduces the union's negotiations costs, and eases the burden of contract administration. It also promotes industry-wide solutions to problems too complex or expensive for any single employer to take on alone, such as the ramifications of technological improvements, and it makes

it possible for small employers to grant certain employee benefits they could not afford to administer alone. Most importantly, however, multi-employer bargaining serves as the single most efficient mechanism for the union to achieve its prime objective: the "elimination of price competition based on differences in labor standards . . . ." *Apex Hosiery*, 310 U.S. at 503.

Employers, too, benefit from broad-scale bargaining. Employers also achieve economies of scale when they combine for a single set of negotiations, and can achieve industry-wide (or at least regional) solutions to structural problems. Small employers also achieve significant protections from union pressure through collective strength;[13] the association typically represents a mutual aid pact to prevent the member companies from being "whipsawed." Most fundamentally, however, by joining with their business competitors in a common labor agreement, employers can obtain protection from "competitive disadvantages resulting from non-uniform contractual terms" setting their labor costs. *Buffalo Linen*, 353 U.S. at 96.

Thus, like the employee combinations explicitly exempted from antitrust scrutiny by the Clayton Act, and the employer-union agreements immunized by the non-statutory exemption recognized in *Jewel Tea* and *Pennington*, the combination of employers in multi-employer groups *assumes*—indeed *depends*—on collusion among business competitors in the negotiations process. Petitioners cannot be permitted to extract all of the benefits of this process while preventing employers from exercising the forms of self-help that make the process work.

C. Antitrust Immunity Must Extend Beyond Contract Expiration

Petitioners' redesign of the labor laws is not limited to denying self-help to the employer group. Like

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[13] *See Bonanno Linen*, 454 U.S. at 409 (employers "sought through group bargaining to match increased union strength" (quoting *Buffalo Linen*, 353 U.S. at 94-95 (footnote omitted)).

the district court, petitioners argue that the employer group violates the Sherman Act if it continues in effect the terms of its labor agreement with the union beyond the contract's date of expiration. Pet. Br. 45-48. Accepting this proposition, however, would work a wholesale revision of federal labor law and would require this Court to reverse its opinion in *NLRB v. Katz*, 369, U.S. 736 (1962), which held that under Sections 8(d) and 8(a)(5), it is an unfair labor practice for an employer to *fail* to give effect to these terms unless and until impasse is reached. The Court has reaffirmed this principle at least twice in recent years, and each of these decisions would have to fall as well if petitioners' argument is to be accepted. *See Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991); *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988). Even the United States, in its brief supporting the petitioners, acknowledges that the petitioners' position simply "cannot be reconciled" with *Katz*. U.S. Br. 16.

Petitioners do not acknowledge the breadth of the alterations to basic principles of federal labor law they ask this Court to make; they insist that they seek, at most, incremental change. They note that in *Litton*, this Court carved an exception to the *Katz* rule, holding that there is no post-expiration obligation to comply with the arbitration clause in an expired agreement with respect to disputes that themselves arise after expiration. Similarly, the NLRB has recognized that it would be antithetical to the central role of self-help in the structure of the NLRA to insist that a union continue to honor a no-strike pledge contained in an expired contract or to demand that an employer honor an expired dues check-off or union security provision. *Litton*, 501 U.S. at 199.

Yet *Litton* explicitly reaffirmed the continuing validity of *Katz*. *Litton* and the Board cases it cites represent a careful accommodation of the *Katz* doctrine and its duty to bargain with the larger purposes of the Act. Petitioners, on the other hand, do not seek to reconcile the obliga-

tions of Section 8(a)(5) with other important policies of federal labor law; they seek to jettison the *Katz* doctrine altogether in the multi-employer context simply to achieve the right to bring a treble damages action under the antitrust laws. Nothing in *Litton* would support such a result.[14]

An additional problem is posed, but left unaddressed, by petitioners' rather unformed proposal. The terms implemented post-expiration by individual members of a multi-employer group necessarily would have their genesis in an agreement in restraint of trade—the joint bargaining proposals of the multi-employer bargaining association. Because the petitioners would have the non-statutory exemption expire with the contract, presumably, it would be a Sherman Act violation for the employers to implement the fruits of their prior conspiracy. Yet in choosing terms to implement, the various members of the employer group would be limited under *Katz* to the offers made by the multi-employer association on their behalf. For this reason, the terms the various employers actually implemented would be identical, or nearly so, and would find their genesis in a "conspiracy," albeit one that was lawful at the time.

This Hobson's choice would result in an antitrust claim each time terms are implemented, with plaintiffs citing as evidence the similarity in implemented terms and the fact that the members of the association continued to meet "in secret"—conspiring—with one another on future bargaining proposals. Multi-employer bargaining disputes would become commonplace topics for federal court litigation.

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[14] Employers find small comfort in the petitioners' fanciful assurance that "[i]f negotiations are advancing toward a new contract, . . . the employees are likely to consent to an extension of the employers' immunity." Pet. Br. 47. It would simply be untenable for this Court to establish federal labor policy predicated on the presumed charity of organized labor. It also would be naive to believe that labor would not use the Sherman Act (rather than the economic power derived from the solidarity of its members) as leverage in collective negotiations.

In sum, the court of appeals' decision establishes a prudent and sensible rule for preventing conflicts between national labor policy and the more general rules of antitrust liability. Petitioners, the United States, and the other *amici* urging reversal, conversely, offer a "dizzying array of options . . . not one of [which] makes the slightest sense under established labor law principles." Pet. App. 21a (footnote omitted). Those urging reversal disagree about the duration of the antitrust exemption (expiration versus impasse), the character and availability of various employer self-help rights (implementation versus lockouts), and the practical consequences of extending antitrust liability following contract termination. If the decision below represented a departure from settled antitrust practice, as petitioners and their *amici* contend, one would expect that they could all agree on a statement of the rule previously and uniformly applied. That they have not done so is telling evidence that the various rules they seek represent unprecedented departures from settled law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,
Petitioners,
v.
PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICI CURIAE OFFICE OF THE COMMISSIONER OF BASEBALL AND MAJOR LEAGUE BASEBALL PLAYER RELATIONS COMMITTEE, INC. IN SUPPORT OF RESPONDENTS

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IN THE

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Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF OF AMICI CURIAE OFFICE OF THE COMMISSIONER OF BASEBALL AND MAJOR LEAGUE BASEBALL PLAYER RELATIONS COMMITTEE, INC. IN SUPPORT OF RESPONDENTS

Pursuant to Rule 37 of the Rules of this Court, the Office of the Commissioner of Baseball and the Major League Baseball Player Relations Committee, Inc. submit this brief as amici curiae in support of respondents. Respondents and petitioners have both consented to the filing of this brief, and the letters of consent have been lodged with this Court.

INTEREST OF AMICI CURIAE

The players in the four major professional sports in the United States, baseball, basketball, football and hockey, are unionized, and the members of each league have a long history of engaging in multiemployer collective bargaining. In professional baseball ("Baseball"), the history extends over 30 years. The Major League Baseball Player Relations Committee, Inc. ("PRC") is the collective bargaining representative of the 28 Major League clubs ("clubs"). The Office of the Commissioner of Baseball ("Commissioner's Office") is responsible for the centralized administration of the game and oversees the activities of the PRC.

If petitioners succeed in their effort to overturn the decision of the court of appeals, labor relations in Baseball are likely to be adversely affected. The fact that Baseball's status under the antitrust laws is different from that of the other major professional sports, *see Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees*, 346 U.S. 356 (1953); *Federal Baseball Club v. National League*, 259 U.S. 200 (1922), will not eliminate this impact.

Collective bargaining in professional sports, as in many other industries, is strongly influenced by pattern bargaining. The results of collective bargaining in the National Football League ("NFL"), the National Basketball Association ("NBA") and the National Hockey League ("NHL") have a serious impact on the course of negotiations in Baseball. As the court of appeals recognized, the legal standard advocated by the petitioners would give "unions a powerful new weapon." Appendix to petition for *certiorari* ("Pet. App.") at 20a. This, in turn, undoubtedly would alter the content of the agreements negotiated not only by the NFL but also by the NBA and the NHL. Thus, although this Court's decisions place Baseball in a different legal posture, the Court's resolution of the important issues presented by this case can

alter the course of future labor relations in all professional sports, including Baseball, by changing the patterns established in collective bargaining. For this reason, the Commissioner's Office and the PRC have a strong interest in the Court's consideration of the issues raised in this case.

Further, the petitioners and certain amici have made assertions concerning the impact that Baseball's antitrust exemption has had on the collective bargaining process. Brief for Petitioners at 44; Brief of the National Hockey League Players Association, National Football League Players Association, Major League Baseball Players Association and National Basketball Players Association (collectively the "Players' Unions") as Amici Curiae in Support of Petitioners ("Players' Brief") at 15-18. The Commissioner's Office and the PRC are uniquely situated to respond to these assertions, which they believe to be demonstrably inaccurate, and to provide a perspective on this topic that will assist the Court in resolving the issues presented by this case.

SUMMARY OF ARGUMENT

For more than thirty years, Baseball and its players have engaged in multiemployer collective bargaining. Baseball has an industry-specific, antitrust exemption reaffirmed by this Court in *Flood v. Kuhn*, 407 U.S. at 282-84. Contrary to the assertions of petitioners and the Players' Unions, there is no evidence that the existence of Baseball's antitrust exemption has had an adverse impact on the bargaining process in Baseball. Although Baseball (like many other industries) has had strikes and lockouts, those disruptions should not be viewed as symptomatic of a problem in collective bargaining. Rather, the use of economic weapons is "part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 489 (1960).

Moreover, a review of the history of collective bargaining in Baseball demonstrates that the clubs have not relied on Baseball's antitrust exemption as a justification for engaging in conduct outside the normal collective bargaining process. In fact, the course of Baseball's collective bargaining has been dictated by historical and economic factors, unrelated to the industry-specific exemption.

The interpretation of the nonstatutory labor exemption advocated by petitioners would disrupt the process of multiemployer bargaining that all professional sports have used to order their economic affairs.[1] The threat of antitrust litigation post-impasse would lead to legal posturing at the bargaining table that would chill negotiations. Moreover, potential antitrust liability would leave employers with little choice but to lock out their employees before undertaking any possible antitrust risk, thus increasing disruptions in the sports industry.

ARGUMENT

I. BASEBALL'S ANTITRUST EXEMPTION HAS NOT HAMPERED OR DISRUPTED THE PROCESS OF FREE COLLECTIVE BARGAINING FOSTERED BY THE NATIONAL LABOR RELATIONS ACT.

More than 70 years ago, this Court first held that the business of Baseball is not subject to the antitrust laws. *Federal Baseball Club v. National League*, 259 U.S. at 208-09. Since 1922, the Court has twice reconsidered Baseball's immunity, and on each occasion it has adhered to its earlier decision. In *Toolson v. New York Yankees*, 346 U.S. at 357, the Court stated that "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." In *Flood v. Kuhn*, 407 U.S. at 282-84, the Court reaffirmed

[1] Multiemployer bargaining is the only appropriate bargaining construct for a professional sports league, and it is significant that all of the Players' Unions insisted on multiemployer bargaining when organizing the leagues.

the apparent "anomaly" of exempting the business of Baseball from antitrust scrutiny, stating that "[w]e continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively." [2]

The antitrust exemption reaffirmed in *Flood v. Kuhn* obviously is not an issue before the Court. However, in an effort to support their argument that the antitrust laws should be given unprecedented application during the collective bargaining process, petitioners assert that the *Flood v. Kuhn* exemption has caused instability in Baseball's labor relations. Brief for Petitioners at 44. *See also* Players' Brief at 16 (asserting that Baseball's antitrust exemption has caused "unstable, disruptive labor relations"). This assertion is not correct.

A. The History of Labor Relations in Baseball Is Similar to That in Other Industries and Provides No Indication That the Process of Collective Bargaining Has Been Adversely Affected by Baseball's Antitrust Immunity.

Petitioners attempt to create the impression that labor relations in Baseball have been uniquely problematic. The fact of the matter is that, during a 30-year bargaining relationship, Baseball has had two significant strikes, one in 1981 and another in 1994. There were also shorter disruptions in 1972, 1976 and 1985. These shorter disruptions, however, did not prevent the season from being played in its entirety.

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[2] Baseball is not the only industry in which the Court has reaffirmed an antitrust exemption because of Congress' failure to eliminate the exemption. *See, e.g., Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 423-24 (1986) (exemption for rate-making by motor freight carriers), *reaff'g Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156 (1922).

As a matter of perspective, it is important to evaluate Baseball's labor relations experience in comparison to the experience in other industries. In recent memory, the NFL, the NBA and the NHL have all had labor disruptions with players or referees. Moreover, industries outside of sports, such as coal and steel to name just two, have had extended periods of poor labor relations marked by strikes that were more frequent, more bitter and more violent than anything that has ever occurred in Baseball. *See* Charles R. Perry, *Collective Bargaining and the Decline of the United Mine Workers* 197-233 (1984) (describing labor relations in the coal industry); John P. Hoerr, *And the Wolf Finally Came: The Decline of the American Steel Industry* 101-105 (1988) (describing labor relations in the steel industry). Because Baseball is the national pastime, its labor problems draw a disproportionate amount of attention. This attention, however, should not disguise the fact that Baseball's collective bargaining has been no worse than that in many other industries.

More important, the argument that Baseball's antitrust immunity has "caused" the work stoppages in Baseball during the last 30 years starts from the false premise that a work stoppage represents a failure in the collective bargaining process that must have been "caused" by some outside force (*i.e.*, the clubs' antitrust immunity in this case). As described in detail below, *see infra* pp. 8-10, this view has no support in the actual facts of Baseball's labor disputes. It is also contrary to the underlying rationale of the federal labor laws.

Congress did not view strikes and lockouts as collective bargaining "failures." Rather, this Court has said that the premise underlying the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.* (1994), is that union and management "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. . . . The presence of economic weapons in reserve, and their actual exercise on occasion by the parties,

is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *Insurance Agents*, 361 U.S. at 488-89. Under such a regime, "the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of . . . the Act; it is part and parcel of the process of collective bargaining." *Id.* at 495. Indeed, the NLRA collective bargaining structure "is premised on the belief that collective discussion *backed by the parties' economic weapons* will result in decisions that are better for both management and labor and for society as a whole." *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 678 (1981) (emphasis added).

Given the NLRA's theory of free collective bargaining, it is not surprising that Baseball and the other professional sports are not the only employers in this country to experience work stoppages. A review of the Players' Brief would suggest that only professional sports leagues —or only industries that utilize multiemployer bargaining —have had labor disputes. To the contrary, industries in which collective bargaining takes place on an individual employer basis have also had tumultuous labor strife over time and in recent years. The United Auto Workers and Caterpillar, the United Paperworkers and A.E. Staley, and the United Rubber Workers and Bridgestone/Firestone (to name just a few) have been locked in particularly lengthy and contentious work stoppages over the last year or more. *See generally New Leadership Elected At AFL-CIO, End Of Major Labor Disputes Lead 1995 Events*, Daily Lab. Rep. (BNA) No. 7, at C-1 (Jan. 11, 1996) (summarizing conclusions to 30-month lockout at A.E. Staley, 17-month strike at Caterpillar and 10-month strike at Bridgestone/Firestone).

The fact that Caterpillar, A.E. Staley, and Bridgestone/Firestone (as single employers) do not have to fear a treble-damage antitrust lawsuit by the unions representing their employees if they continue terms of an expired agreement or unilaterally impose new terms after a lawful

impasse in bargaining no more "caused" these labor disputes than Baseball's antitrust immunity "caused" the work stoppages that Baseball has experienced. Rather, the "exercise [of economic weapons] . . . by the parties . . . is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized"—not evidence of some inappropriate outside force or a "breakdown" of the collective bargaining process. *Insurance Agents*, 361 U.S. at 489.

B. The Course of Baseball's Labor Relations Has Been Dictated by Historical and Economic Factors Unrelated to Baseball's Antitrust Exemption.

Contrary to the assertions of petitioners and the Players' Unions, there is no reason to believe that the strikes and lockouts that have occurred in Baseball were related to Baseball's status under the antitrust laws. In fact, Baseball's history of labor relations is better explained by a confluence of special historical and economic factors.

To fully appreciate Baseball's special bargaining history, one must begin with the proposition that collective bargaining agreements in professional sports represent a "unique bundle of compromises." *Wood v. National Basketball Ass'n*, 809 F.2d 954, 961 (2d Cir. 1987); *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246, 256 (S.D.N.Y.), *aff'd*, 67 F.3d 1054 (2d Cir. 1995). This point is well illustrated by the NFL and the NBA. In both of these sports, the collective bargaining parties have reached the same essential compromise. The players received free agency, which increased individual bargaining power and player salaries. *See Wood*, 809 F.2d at 861. In return, the owners received an entry-level draft and a salary cap, which served "the interests of the employers in stabilizing salary costs and spreading talent among the various teams." *Id.*

Unfortunately, Baseball missed the opportunity to reach the kind of fundamental compromise achieved in the NBA and the NFL. In 1976, the players in Baseball

secured free agency rights through an arbitration. *See National and American Leagues of Professional Baseball Clubs v. Major League Baseball Players Ass'n*, 66 Lab. Arb. Reps. (BNA) 101 (1976) (Seitz, Arb.).[3] Since 1976, Baseball, despite its special status under the antitrust laws, has had the most open and competitive free agency system in professional sports. *See generally* Paul D. Staudohar, *The Sports Industry and Collective Bargaining* 38 (2d ed. 1989) (characterizing Baseball's free agency system as "wide open"). Beyond the basic reserve system (which limits the ability of young players to change teams), Baseball's collective bargaining agreement, without a salary cap or similar mechanism, contains few, if any, provisions that reflect "the interests of employers in stabilizing salary costs and spreading talent among the various teams." *Wood*, 809 F.2d at 961.

Moreover, Baseball has certain unique economic characteristics that, when combined with its "wide open" system of free agency, have placed the smallest-market clubs in constant peril. Most important, there is great disparity in the revenues generated by the clubs. Because Baseball plays far more games than professional football, basketball or hockey, gate revenue—which is often closely correlated with local population—is a very important revenue source. Also because of the number of games, Baseball sells television rights not only nationally (like the NFL) but also locally. As one would expect, local television rights are much more valuable in large population centers. Due to these and other factors, Baseball has clubs that generate local revenues more than three times those of some of their competitors on the field.

The wide revenue disparity among the clubs causes difficulties because there is a single market for Baseball players. In that single market, the clubs with the most revenue set the price for free agent players. Clubs with

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[3] The right to arbitrate disputes over contract matters, of course, was a right that the players had won in collective bargaining.

less revenue are faced with the difficult choice of paying the market rate or losing their talent.[4]

The combination of Baseball's player compensation system and the revenue disparity in the industry has created serious economic issues in the game. In every round of negotiations since 1976, the clubs have sought changes designed to serve their interests in "stabilizing salary costs and spreading talent among the various teams." *Wood*, 809 F.2d at 961. Unfortunately, the players have viewed these efforts as an attempt to "roll back players' free agency rights. Players' Brief at 16.

It is a fundamental tenet of labor relations that the most difficult and contentious type of collective bargaining occurs when a union is asked to respond to changed or difficult economic circumstances in an industry. *See* James B. Dworkin, *Owners Versus Players: Baseball and Collective Bargaining* 35 (1981) (describing typical union reaction to effort to reform a collective bargaining agreement). The instability that petitioners perceive in Baseball's labor relations has not been caused by the fact that the industry is exempt from the antitrust laws but rather by the fact that, since 1976, the clubs have felt compelled repeatedly to seek fundamental reforms of Baseball's collective bargaining agreement in an effort to protect the weakest members of the industry. Given these factors and the extraordinary financial stakes involved, it is hardly surprising that Baseball has had difficult negotiations with its players' union, regardless of the industry's status under the antitrust laws.

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[4] A similar problem exists with respect to many of the players who are not eligible for free agency. Under Baseball's player compensation system, many non-free agents are eligible for the process of salary arbitration. A principal purpose of the salary arbitration process is to eliminate club-to-club variations in salary. *See* Marvin Miller, *A Whole Different Ball Game* 109 (1991). In fact, Baseball's salary arbitration system precludes the arbitrator from considering the financial position of a club in setting a player's salary. *See Silverman*, 67 F.3d at 1057-58.

II. THE KIND OF UNILATERAL ACTION THAT PETITIONERS MAINTAIN SHOULD BE SUBJECT TO ANTITRUST SCRUTINY HAS NOT PLAYED A SIGNIFICANT ROLE IN BASEBALL'S COLLECTIVE BARGAINING.

A review of the history of collective bargaining in Baseball demonstrates that the process has worked in the manner that Congress envisioned when it passed the NLRA. The clubs and players often have bargained hard. At times, economic force has been used. But in the end, the parties have reached new agreements. There is simply no evidence that Baseball's exemption from the antitrust laws has caused the clubs to have a special proclivity for unilateral action. In fact, history demonstrates that the clubs have not relied on Baseball's antitrust exemption as a justification for engaging in conduct outside the normal collective bargaining process:

• In 1972, the players engaged in a brief early-season strike in an effort to secure additional contributions to their pension plan. After just 13 days, "[a]s is true in most effective collective bargaining situations, both sides had to compromise to reach agreement . . . ." Dworkin, *Owners Versus Players* at 33. There was no threat or talk of unilateral implementation in 1972.

• The 1976 negotiations took place against the backdrop of the arbitration decision that granted baseball players free agency after essentially two seasons of service. *See National and American Leagues*, 66 Lab. Arb. Reps. (BNA) 101. The central issue in the negotiations was the length and contours of the new reserve system. *See* Dworkin, *Owners Versus Players* at 34. The clubs locked out the players during spring training "in the hopes of forcing them to reach a quick agreement." *Id.* Commissioner Kuhn, however, opened the camps, play commenced, and a negotiated agreement was reached in July. Again, there was no threat of a declaration of impasse or unilateral implementation.

• If the clubs had ever been inclined to act unilaterally, the 1980-81 negotiations provided a perfect opportunity. The collective bargaining parties engaged in protracted negotiations and, by May of 1980, it was clear that the parties were deadlocked on the single issue of "direct player compensation." [5] *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 516 F. Supp. 588, 591 (S.D.N.Y. 1981). Despite these developments, the clubs made no effort to act unilaterally. Rather, they reached an agreement with the Major League Baseball Players Association ("Players Association") that allowed the 1980 season to be completed uninterrupted and created a joint committee to attempt to resolve the direct player compensation issue. *Id.* at 591-92. The agreement also provided that, if the joint committee failed to resolve the player compensation issue, a proposal previously made by the clubs would become effective during the 1981 season and the Players Association would have the right to reopen the contract. *Id.* It was this reopener that led to the long strike in 1981.

• On August 6, 1985, after protracted negotiations, the players struck. As one commentator observed, however, "no one really wanted a strike . . . ," and a settlement was reached in just one day. Staudohar, *The Sports Industry and Collective Bargaining* at 57. There was no talk of unilateral implementation during the 1985 negotiations.

• In 1990, the clubs again attempted to use the leverage of a spring training lockout to force a quick agreement. The strategy was successful in 1990 in the sense that an agreement was reached without the loss of any regular-

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[5] Direct player compensation is an aspect of the free agency system in a number of professional sports. Under a direct player compensation provision, a team that signs a free agent who formerly played for another team is required to "compensate" the player's former team by providing that team with another player or, in some cases, a draft choice.

season games. Moreover, there was no threat of impasse or unilateral implementation.

• 1994 was the one round of collective bargaining in Baseball where impasse and unilateral implementation arguably played a role. While the clubs eventually took unilateral action, it came only after the Players Association had already been out on strike for four months. As such, it is clear that the unilateral implementation did not cause the strike. Moreover, the Players Association used its rights under the NLRA and the NLRB enforcement mechanism to reverse the clubs' 1994 unilateral implementation.

As the foregoing amply demonstrates, Baseball's antitrust exemption has had little or no impact upon collective bargaining. Under the system of industrial relations fostered by the NLRA, the clubs and the players have engaged in collective bargaining and, when necessary, exerted economic leverage in order to reach agreements. There is no evidence that Baseball's antitrust exemption made the clubs more prone than other employers to try to act unilaterally.[6] Equally important for present purposes, there is no reason to believe that injecting the threat of antitrust litigation into the bargaining process would have made Baseball's labor situation more "stable."

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[6] Certain amici have gone to rather unusual lengths to convince the Court that there is some relationship between Baseball's labor disruptions and its antitrust exemption. One group of amici actually attached the transcript of a television show where the President of the NFL, Neil Austrian, made certain comments about the impact of Baseball's exemption on the players' 1994 strike. *See* Players' Brief, Appendix at 2a. With all due respect to Mr. Austrian, he has no particular knowledge of Baseball, the events surrounding the 1994 strike, or labor relations. The amici's reliance on an offhand comment on a television show to support their argument shows how speculative that argument is.

III. APPLICATION OF THE ANTITRUST LAWS IN THE MANNER ADVOCATED BY PETITIONERS WOULD DESTROY MULTIEMPLOYER BARGAINING IN PROFESSIONAL SPORTS AND CREATE CHAOS.

As Congress and this Court have previously recognized, there is "cogent evidence that in many industries . . . multi-employer bargaining . . . [is] a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *NLRB v. Truck Drivers Local Union No. 449 ("Buffalo Linen")*, 353 U.S. 87, 95 (1957) (referring to congressional debates on Taft-Hartley amendments to NLRA). In every major professional sport, multiemployer collective bargaining agreements establish uniform terms and conditions of employment such as roster sizes, scheduling rules and playing rules that are crucial to the competitive character of the enterprise.

Perhaps the most important component of the economic arrangements reached through collective bargaining in professional sports is the free agency/reserve system. *See Silverman*, 67 F.3d at 1061-62.[7] A free agency/reserve system is nothing more than a method of regulating the timing and circumstances under which players (*i.e.*, employees) can move from one team (*i.e.*, employer) to another. There are many reasons why such a system is vital to the stability of all professional sports: (1) the free agency/reserve system often determines the share of revenues going to teams and players; (2) the free agency/reserve system preserves a degree of roster continuity, which is important to maintaining fan interest; (3) the free agency/reserve system helps to ensure high-quality play by requiring that individuals practice and play with the same teammates for a certain period of time; and

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[7] As noted above, *supra* p. 8, in two major sports—football and basketball—the free agency/reserve system is accompanied by a salary cap.

(4) the free agency/reserve system allows teams to recoup development costs. *Id.* at 1061.

Because a free agency/reserve system regulates the interchange of employees among different employers, it would be difficult, if not impossible, to establish such a system in bargaining between groups of players and each single team.[8] Conversely, if multiemployer bargaining is disrupted in professional sports, it is difficult to imagine how the industry will be able to operate and what mechanism will perform the crucial functions now handled by the free agency/reserve system.

The unprecedented interjection of the antitrust laws into the collective bargaining process advocated by petitioners would destroy multiemployer bargaining in professional sports. Key components of the agreements commonly reached in the sports industry, including the free agency/reserve system and the salary cap system, would provide fertile ground for potential antitrust plaintiffs. The potential for antitrust liability would not only provide "unions with a powerful new weapon," Pet. App. at 20a, but it would also inevitably lead both bargaining parties to alter their conduct at the bargaining table to

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[8] In fact, there is a line of authority indicating that professional sports leagues are joint employers, rather than multiemployer groups. *See Major League Rodeo, Inc.*, 246 N.L.R.B. 743 n.2 (1979) (holding that Major League Rodeo and its constituent members constituted a joint employer bargaining unit); *North American Soccer League*, 236 N.L.R.B. 1317, 1319 (1978) (holding that soccer league and its member clubs were joint employers for bargaining purposes), *later proceeding*, 241 N.L.R.B. 1225 (1979), *enf'd*, 613 F.2d 1379 (5th Cir.), *cert. denied*, 449 U.S. 899 (1980).

Consistent with this line of authority, the current Chief Justice has expressed the view that sports leagues have some of the characteristics of a "single enterprise." *National Football League v. North American Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of *certiorari*). A finding that a sports league is a single enterprise would provide an alternative basis to conclude that the antitrust laws do not apply.

prepare for the inevitable onslaught of litigation. This kind of posturing cannot help but impede productive collective bargaining.

The fact that under the theory advocated by the United States and the Federal Trade Commission, the antitrust laws would become applicable only at impasse provides little solace.[9] Brief of the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioners at 9. As the Court has recognized, impasse is a state of affairs that can be brought about intentionally by one or both parties. *Charles D. Bonanno Linen Serv. v. NLRB*, 454 U.S. 404, 412 (1982). Under the interpretation of the nonstatutory exemption advocated by petitioners, a professional sports union could force the bargaining process to impasse and thereby create an impossible dilemma for the teams. At the point of impasse, the teams would have to choose between: (1) exposing themselves to potentially massive antitrust liability by continuing key collective bargaining provisions such as the free agency/reserve system; and (2) operating with no uniform arrangements with respect to the interchange of players among the various teams.

In fact, if petitioners' theory were accepted, there would necessarily be more, not less, "labor strife" or "chaos" in collective bargaining in professional sports. Despite the Players' Unions' generous advice to the leagues that "all that [they] need to do is to comply with the rule of reason and the antitrust laws in implementing their proposals," Players' Brief at 24, no league would

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[9] As an alternative, petitioners contend that the nonstatutory exemption should end upon expiration of a collective bargaining agreement. No federal court of appeals has ever accepted this position. This is hardly surprising given that, until impasse, employers are *required* by the labor laws to maintain the status quo on all mandatory topics of bargaining. *See NLRB v. Katz*, 369 U.S. 736, 742-43 (1962). It is hard to imagine how conduct required by the federal labor laws would also violate the federal antitrust laws.

risk bankrupting its franchises by following such a foolhardy course of conduct. If, several years later when the antitrust action finally went to trial, an antitrust jury concluded that the implemented collective bargaining proposals were not "reasonable" terms, the treble-damage award would probably put some teams in the league out of business.[10] Nor would a league attempt to operate under the chaos that would exist if there were no uniform contract negotiating and signing rules or player allocation system. Therefore, petitioners' proposed rule of law would leave sports leagues with one and only one plausible course of action at the expiration of each collective bargaining agreement—to lock out the players until a new labor agreement is reached.

The Players' Unions acknowledge that, even under their misguided view of the antitrust laws' role in the collective bargaining process, a lockout (*i.e.*, a concerted refusal to employ a certain group of workers) by a multiemployer group would be lawful. Players' Brief at 24. As the court below, Pet. App. at 27a-28a, and the Second Circuit in *National Basketball Ass'n v. Williams*, 45 F.3d 684, 691-92 (2d Cir. 1995), *pet. for cert. filed*, No. 95-137 (July 24, 1995), pointed out, this Court's decision in *Buffalo Linen*, 353 U.S. at 94-96, mandates

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[10] The absurdity of petitioners' view of the role that the antitrust laws should play in the collective bargaining process may be best illustrated by the Players' Unions' acknowledgment that antitrust courts and juries would be judging the "reasonableness" of employer collective bargaining proposals if petitioners prevail in this case. Of course, this Court has held that Congress determined that the NLRB—the government agency in charge of enforcing the federal collective bargaining laws—would have no authority to pass on the reasonableness of a party's bargaining proposals. *See Insurance Agents*, 361 U.S. at 488; *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). Under petitioners' theory, as the Players' Brief freely acknowledges, federal courts and juries that may have no particular labor relations expertise would be doing precisely what Congress expressly determined would not be done by *any* governmental body.

such a result. *See also NLRB v. Brown*, 380 U.S. 278, 285 (1965). In fact, the Players' Unions opine that "a lockout [is a] particularly powerful weapon[] for employers in professional team sports." Players' Brief at 24 n.10. Regardless of whether the Players' Unions are right about the effectiveness of lockouts in this industry —and there is substantial reason to doubt their assessment—the lockout would certainly become the only rational employer response to the expiration of a collective bargaining agreement.

Thus, the "havoc to labor relations in professional team sports," Players' Brief at 6, that petitioners and the Players' Unions decry and purportedly seek to remedy through their petition to this Court would, in fact, be the state of affairs *mandated* by their proposed interjection of the antitrust laws into matters that Congress either regulated through the federal labor laws or "left for the free play of contending economic forces." *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 150 (1976) (internal quotation marks omitted).

In addition to passing on the reasonableness of collective bargaining proposals, the federal courts, under the interpretation of the nonstatutory exemption advocated by petitioners, would also have to make determinations as to the existence of an impasse. As the Court has recognized, impasse is a transitory state of affairs. *Charles D. Bonanno Linen Serv.*, 454 U.S. at 412. If petitioners' theory were adopted, courts would be forced into the unenviable position of evaluating when an impasse existed in order to determine whether a particular antitrust claimant has a cause of action. This in-depth involvement by the federal courts in labor disputes would again run contrary to fundamental policies underlying the NLRA and the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.* (1994).

Finally, the notion that an individual sports franchise could avoid potential antitrust liability by imposing, at

impasse, terms and conditions of employment separate from the rest of the teams in the league is absurd. The entire purpose of a free agency/reserve system is to regulate the conditions under which individual players may move from team to team. It would simply be impossible for each team to impose its own version of a free agency/reserve system because those versions inevitably would not be compatible.

In sum, the entire professional sports industry has ordered its affairs in reliance on the long-standing federal labor policy that encourages multiemployer collective bargaining. To interject the antitrust laws into multiemployer bargaining would have severe structural repercussions in professional sports and other industries in which multiemployer bargaining has long been the norm. To avoid this result, the Court should reject petitioners' effort to seek a treble-damage antitrust recovery based on conduct authorized under the labor laws.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 16, 1996

No. 95-388

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, *et. al.*,

Petitioners,

—v.—

PRO FOOTBALL, INC. *d/b/a*
WASHINGTON REDSKINS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NATIONAL HOCKEY LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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No. 95-388

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ANTONY BROWN, *ET AL.*,

PETITIONERS,

VS.

PRO FOOTBALL, INC. D/B/A
WASHINGTON REDSKINS, *ET AL.*,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NATIONAL HOCKEY LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

This brief in support of respondents is submitted in accordance with Rule 37 of the Rules of this Court. The National Hockey League ("NHL") has obtained and filed herewith the written consent of petitioners and respondents to the submission of this brief.

INTEREST OF AMICUS CURIAE

The determination of this case will have direct implications for the NHL, whose member clubs, like those in all other professional team sports, have engaged in multiemployer bargaining with their players for over two decades. Reversal of the decision below would throw labor relations in professional sports into chaos, and would render the NHL and other sports leagues vulnerable to antitrust attack if their member clubs, after the expiration of a collective bargaining agreement, and while bargaining in complete good faith to reach a new agreement, complied with their traditional labor law duty of continuing in effect the pre-expiration terms and conditions of employment, or exercised their rights under the labor laws collectively to implement new terms following a good faith bargaining impasse. That result would have a significant and deleterious impact on professional sports, a multi-billion dollar worldwide industry in which the NHL plays a significant role.

The NHL joins in the arguments made by respondents and the other *amici* urging affirmance, and submits this brief to bring to the Court's attention important facts regarding its own experience in the most recent round of collective bargaining in hockey. Of particular importance is that (i) the efforts of the National Hockey League Players Association ("NHLPA") to inject the antitrust laws into the collective bargaining process had the effect of hindering, not furthering, that process, and created the conditions that required the NHL to consider implementing revised employment terms, (ii) the NHL's unilateral implementation of collective bargaining proposals was the catalyst that brought the union back to the bargaining table, and (iii) two recent labor-management disputes in the hockey industry have been resolved by traditional labor law remedies, and not by wasteful antitrust litigation.

ARGUMENT

The court below specifically referred to the NHL's recent labor dispute as evidence that the collective bargaining process could succeed without the intrusion of the antitrust laws. *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1058 (D.C. Cir. 1985) ("we think the recently resolved labor dispute in the National Hockey League illustrates that collective bargaining, instead of litigation, can operate as an effective means of union-employer dispute resolution in professional sports"). Indeed, that experience—a totally distorted and inaccurate version of which appears in Petitioners' Brief (at 43-44 & n.28) and in the brief submitted by the NHLPA and other professional sports unions[1] as *amici curiae* (at 14-15)—offers a vivid demonstration of why the scope of the labor exemption as defined by the Court below, by the Second Circuit in *National Basketball Ass'n v. Williams*, 45 F.3d 684, 692 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3070 (U.S. July 24, 1995) (No. 95-137) and by the Eighth Circuit in *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), fosters, and does not undermine, the collective bargaining process.

The NHL-NHLPA Negotiations

Following a 10-day player strike in 1992, the NHL and NHLPA entered into a collective bargaining agreement that expired on September 15, 1993. Negotiations toward a successor agreement began a few months prior to the expira-

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[1] The NHLPA submitted a joint *amicus curiae* brief with the players' unions for the other three major sports leagues (the Major League Baseball Players Association, the National Football League Players Association and the National Basketball Players Association) (hereinafter cited as "NHLPA Br. at __").

tion date. From the outset of the negotiations, the NHLPA maintained that any continuation in effect of the terms and conditions of the expired agreement would constitute an antitrust violation and could expose the NHL and its member clubs to treble damage liability. (NHL App. 1a-2a.)[2] This position, of course, had no support in law, and had continually been rejected by courts in cases both in and outside of professional sports.[3] In fact, throughout the negotiations, the union threatened antitrust litigation if the League continued in effect the pre-expiration terms and conditions of employment (as it was required to do under the labor laws) or instituted new terms and conditions of employment following impasse (as it was entitled to do under the labor laws).

Consistent with its contemplated litigation strategy, the NHLPA delayed in providing the NHL with a comprehensive set of proposals, and then refused to discuss its proposals—despite the continuing insistence of the NHL that it do so—until December 1993. In January 1994, the NHL proposed a system for acquiring, retaining and compensating players that was premised on the concept that player compensation should be linked with revenues. At the outset of the next bargaining session, the NHLPA rejected this proposal

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[2] Pertinent documents are reproduced in an Appendix to this Brief (cited herein as "NHL App. at __").

[3] *See Powell v. National Football League*, 930 F.2d at 1300-04; *Amalgamated Meat Cutters & Butchers Workmen v. Wetterau Foods, Inc.*, 597 F.2d 133, 136 (8th Cir. 1979); *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers*, 431 F.2d 1004, 1006-07 (5th Cir. 1970), *cert. dismissed*, 404 U.S. 801 (1971); *Kennedy v. Long Island R.R. Co.*, 319 F.2d 366, 373 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963); *Clune v. Publishers' Ass'n*, 214 F. Supp. 520 (S.D.N.Y.), *aff'd*, 314 F.2d 343 (2d Cir. 1963).

summarily, and claimed—before even one minute of discussion on the League's proposals—that the parties were at impasse and that further bargaining would be futile.

Beginning in March 1994, the NHLPA simply refused to bargain with the NHL, insisting that "impasse" had been reached and that it would not return to the bargaining table until the NHL had unconditionally and permanently withdrawn any proposed system that would link, in any way, player salaries and revenues. (NHL App. 3a-4a.) It assumed this posture after only three perfunctory bargaining sessions concerning the League's proposal, with no suggestion that the NHL was not bargaining in good faith, and with no effort whatsoever to invoke any of its remedies under the labor laws. For five months thereafter, the union refused even to meet with the NHL, notwithstanding numerous requests from the League to resume negotiations.

On July 18, 1994, the NHL (a) advised the union that, because of its refusal to bargain, the League had been left with no alternative but to propose significant changes to other terms and conditions of player employment, and (b) submitted to the union a broad range of economic proposals, including the elimination of salary arbitration, the elimination of *per diem* allowances, and substantial reductions in pension and insurance costs. The NHLPA did not respond. Accordingly, in light of the union's refusal to bargain in any meaningful way, the NHL advised the NHLPA on August 1, 1994 that it intended to implement many of the League's July 18 proposals when training camps opened for the upcoming season if a new collective bargaining agreement was not reached by that time. (NHL App. 5a-10a.) This exercise of labor law rights prompted the NHLPA, following five months of recalcitrance, to agree to return to the bargaining table.

Thus, it was only after the NHL had announced that certain changes in working conditions would be unilaterally implemented at the start of training camp that the union returned to the bargaining table. When those negotiations failed to produce an agreement, the NHL both implemented certain revised terms for the 1994 training camps, and then further exercised its labor law rights, locked out the union members, and announced that the 1994-95 season would not commence until a new collective bargaining agreement was reached.

We emphasize that the NHL did not take this action because it feared antitrust challenge to the necessarily common terms and conditions of employment it had implemented;[4] indeed, judicial decisions already rendered in *Powell* and *Williams* had suggested there would be no such risk of liability. Rather, the NHL chose to lock out because had it permitted the players to return to work, it feared that the union would, in false reliance on a possible antitrust remedy, engage in the same desultory pattern of sham bargaining that had characterized its conduct throughout 1994, or engage in a late strike as it had in 1992. Ultimately, the NHL concluded that a combination of unilateral implementation *and* other traditional economic weapons would best force meaningful bargaining and lead to a collective agreement.

After a three-month lockout—with no antitrust litigation—the parties reached a new collective bargaining agree-

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[4] Petitioners quote the statement of one club's general manager as "evidence" of this purported fear. (Petitioners' Br. at 43-44 n.28; *see also* NHLPA Br. at 15 n.4). That general manager, however, simply observed that the NHL does not have baseball's complete exemption from the antitrust laws, not that the labor exemption—as interpreted consistently to date—would not protect the NHL from an antitrust suit.

ment on January 13, 1995, and the NHL season commenced shortly thereafter. The new agreement represents a compromise by both sides and is a product of conventional and widely accepted labor relations tactics with no interference from the antitrust laws.

Significance of the NHL-NHLPA Experience

The NHL-NHLPA experience confirms both the destructive influence of the antitrust "threat" and the benefits to the negotiating process if each side is permitted to exercise, or threaten to exercise, its fundamental labor law rights.

The players' professed desire to vindicate their "antitrust rights" did nothing to help the collective bargaining process. To the contrary, it had at least two pernicious effects. First, the effort to create an artificial impasse to preserve some prospect of antitrust litigation resulted in either an outright refusal to negotiate or meaningless and perfunctory bargaining as the NHLPA tried to enhance its litigation posture by engineering an end to the nonstatutory labor exemption. Second, the specter of antitrust litigation corroded the negotiations themselves, and caused the suspension of the bargaining process for months at a time as the players steadfastly refused to bargain, presumably out of the fear that doing so would have broken the impasse, and thereby reinstated the labor exemption.

In contrast, and contrary to petitioners' statement (Petitioners' Br. at 36), there can be no question that the unilateral implementation of terms and conditions of employment by the NHL in August 1994 *stimulated* the bargaining process and immediately brought the NHLPA back to the table after a five-month antitrust-inspired hiatus, breaking the artificial impasse. It cannot be overlooked that the head of the union contacted the NHL Commissioner to renew negotiations

within days of being advised of the League's intention to alter employment terms unilaterally. Moreover, if the NHL had not exercised its right unilaterally to implement or lock out, it would have had no choice, given the clear need for common and uniform employment terms, to have continued in effect the pre-expiration terms and conditions of employment. Thus, it was the utilization of labor law weapons—not antitrust threats—that brought about agreement. If anything, the antitrust overlay delayed the parties from reaching a new agreement.

Petitioners' assertion that members of a multiemployer group can avoid antitrust liability by the simple expedient of individually implementing their own employment terms (Petitioners' Br. at 40) displays either their disingenuousness or a remarkable lack of understanding of both the labor laws and the antitrust laws. After impasse, employers are entitled to implement new terms of employment at impasse, but only to the extent that they were reasonably comprehended within the scope of its pre-impasse proposals. *See, e.g., Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988) (citing *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 381 (1965)).

If individual clubs in a sports league engage in multiemployer bargaining—as courts have suggested they *must*[5]—and if they jointly submit proposals to the players union, the players would undoubtedly contend that whatever terms each club implemented post-impasse on a purportedly "individual" basis were the result of conscious parallelism or somehow otherwise reflected the collusive conduct barred by the Sherman Act. Moreover, it would completely undermine

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[5] *See National Basketball Ass'n v. Williams*, 45 F.3d at 692; *North Am. Soccer League v. NLRB*, 613 F.2d 1379, 1382-83 (5th Cir.), *cert. denied*, 449 U.S. 899 (1980).

the stability of multiemployer bargaining if employers were forbidden from implementing new terms and instead were compelled to employ more drastic means, such as work stoppages.

Likewise, petitioners' contention that unilateral implementation is a one-sided measure that carries no risks for management (Petitioners' Br. at 36) flies in the face of federal labor law. Obviously, unilateral implementation may serve as provocation for a strike, a significant risk for employers, particularly in a non-essential and highly competitive business such as entertainment. In addition, as this Court has held, management's right at impasse to implement new terms of employment counterbalances the union's additional right at impasse, as a general matter, to make interim agreements with individual members of the multi-employer unit (*i.e.*, the right to "whipsaw" management). *See Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 416-17 (1982).

The overall experience of the NHL and NHLPA in their recent labor negotiations therefore demonstrates that (a) the federal labor laws provide all the economic weapons employees and employers need to counterbalance one another, including unilateral implementation of terms and conditions of employment, and (b) affording at impasse union members an additional weapon—the antitrust laws—would have *de*structive, not *con*structive, consequences for labor relations.

CONCLUSION

For the foregoing reasons and those set forth in the Brief for Respondents, in which we join, *amicus curiae* National Hockey League respectfully submits that the court below delineated the proper boundary for termination of the nonstatutory labor exemption. The judgment of the Court of Appeals therefore should be affirmed.

Respectfully submitted,

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February 16, 1996

APPENDIX

NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION
One Dundas Street West, Suite 2400, P.O. Box 84, Toronto, Canada M5G 1Z3
Telephone: (416) 408-4040 FAX: (416) 408-3685

September 15, 1993

Commissioner Gary B. Bettman
National Hockey League
650 Fifth Avenue
33rd Floor
New York, NY 10019-6108

Via Fax

RE: Expired Collective Bargaining Agreement

Dear Gary:

At the end of the day today, the Collective Bargaining Agreement ("CBA") between the National Hockey League Member Clubs and the National Hockey League Players' Association will expire. To ensure that there are no misunderstandings, this letter will summarize the players' position now that the CBA is about to end.

First, the Association is ready to continue to negotiate in good faith after the CBA expires. However, consistent with the Players' Association's position throughout negotiations, now that the CBA has expired, please understand that we do not agree or consent to a continuation of those terms of the expired CBA that establish restraints on competition for player services. We also expressly waive any rights under the labor laws that we may have to object to a change to such restraints prior to a lawful impasse. Accordingly, any continued adherence to those restrictions on player movement will constitute unilateral action on the part of the owners. And, as we have advised you in the past, the Players' Association believes that any unilateral imposition by the owners of restrictions on player movement violates the antitrust laws.

Second, as reflected by our August 18, 1993 proposal, the only type of system governing player movement that the Players' Association will accept is one that provides meaningful and significant free

agency during a player's career. Anything short of such a system is totally unacceptable.

We look forward to resuming negotiations.

Yours very truly,

NATIONAL HOCKEY LEAGUE
PLAYERS' ASSOCIATION
/s/
Robert W. Goodenow
Executive Director and General Counsel

NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION
One Dundas Street West, Suite 2300, P.O. Box 84, Toronto, Canada M5G 1Z3
Telephone: (416) 408-4040 FAX: (416) 408-3685

May 18, 1994

Jeffrey Pash, Esq.
Senior Vice President/
General Counsel
National Hockey League
650 Fifth Avenue
New York, NY
10019

Via Telecopier
212-636-0287

Dear Jeff:

I am writing in response to your letters of May 4, 1994. First, with respect to "Games 83 and 84" and "international hockey," I think we have each made our differing legal positions clear several times and endless letters repeating these positions seems pointless to me.

With respect to my letter of April 27th, as to which you claim puzzlement, I am even more puzzled by your strained efforts to avoid a direct response. On behalf of the players and agents who are directly affected, I simply asked that you advise us of whether the Clubs plan to follow the previous "critical date calendar." I find your refusal to tell me yes or no frankly inexplicable. We had hoped to be able to inform the agents of your intentions at our upcoming agent meeting next week.

We of course vigorously disagree with your assertion that the parties are not at an impasse in bargaining. Again, there is nothing to be gained by debating the point. As you must know, the parties are in complete disagreement over the seminal "system" issues which have been the central focus of negotiations i.e. the NHL's insistence on a system where players salaries are tied to revenues, thereby resulting in any form of salary "cap." The record -- and the law -- could not be more clear at this point that an impasse has in fact been reached.

Similarly, I categorically reject your misleading characterization of the NHLPA's current stance as a "refusal to meet" with you over "any aspect of" the expired CBA. Precisely because the parties are at loggerheads on the central systematic issue in the negotiations no productive purpose would be served in meeting or negotiating on the multitude of secondary issues. However, as we told you repeatedly during our several bargaining sessions on the issue, we will gladly meet to discuss other issues if and when the Clubs withdraw their absolute insistence on a system where player salaries are tied to revenues, thereby resulting in any form of salary "cap." We still remain willing to meet if the Club retreat from that position.

Finally, with respect to your request for me to advise you about any future litigation plans of the NHLPA or individual players, as you know, under applicable law the NHLPA has no standing to bring an action under the antitrust laws regarding restrictions on players. With regard to suits by individual players, that is a matter that is up to them.

Yours very truly,

NATIONAL HOCKEY LEAGUE
PLAYERS' ASSOCIATION
/s/
Robert W. Goodenow
Executive Director and General Counsel

RWG/llh

NATIONAL HOCKEY LEAGUE
1251 Avenue of the Americas, New York, NY 10020-1198
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Jeffrey Pash Senior Vice President, General Counsel

August 1, 1994

BY FACSIMILE AND FIRST CLASS MAIL

Robert Goodenow
Executive Director and General Counsel
National Hockey League Players' Association
One Dundas Street West, Suite 2400
Toronto, Ontario M5G 1Z3
CANADA

Dear Bob:

The NHLPA's refusal to meet for almost five months, and total silence during the two weeks since receiving our revised collective bargaining proposals, has not caused us to withdraw our system proposal reflected in our letter of January 12th. To the contrary, we continue to believe that the League and the NHLPA must work together to redesign the system under which the clubs and the players operate so as to ensure an equitable sharing of the growth from the successes we hope to enjoy.

Given the NHLPA's apparent disinterest in negotiating over revised economic terms and other working conditions, we evidently must, one month before the scheduled opening of training camp, decide on our own what those terms and conditions will be. In this context and most reluctantly, this is to advise you that, absent an agreement to the contrary, it is the League's intention to implement, effective with the start of training camp, the following from the proposals enclosed with my letter of July 18:

6. We propose to reduce Player Finish and Other Money Awards ("Player Fund") under Article IX of the MOU to

$2 million (mixed) to be payable to the finalists in the Stanley Cup competition.

7. We propose to eliminate the present multiple contract forms, and replace them with a single Standard Player Contract form with a fixed term and no fixed options. All options, all skill guarantees, and all injury guarantees that extend beyond hockey-related illness and injury must be individually negotiated. Contracts will automatically be deemed "two way" contracts in the event of assignment to the minor leagues. Contract addenda (except as to compensation terms) will be in standard form.

   Contracts and addenda must be approved by the Commissioner and registered with the League. Copies will be furnished to NHLPA, and each party may continue to disseminate contract information to their members and affiliates.

8. Salary Arbitration – We propose to eliminate this Article.

9. Medical Care –

   a. We propose to continue to provide the medical, dental and hospitalization coverages as at present. The League may provide these benefits through its captive (I.C.E.) or another insurer of its choosing, and may administer the plan directly, through an insurance company, or through a third party administrator.

   b. We propose that deductibles in the amount of $750 per person and co-insurance of 70%–30% to $10,000 will be implemented with the next plan year. Clubs may reopen this Article upon passage of a national health insurance program in the U.S.

c. We propose to continue to provide these coverages with no premium cost sharing in the case of players earning $350,000 or less. Players earning more than $350,000 will pay their own premiums.

d. We propose that insurance for retired players shall be continued, with the retired participants and their dependents constituting a separate actuarial experience pool and with separately determined premiums.

10. Pension –

a. Without prejudice to our position in any pension litigation, we propose to eliminate the senior player benefit.

b. We propose to make the pension plan contributory for players earning in excess of $350,000. Such players would be required to contribute 50% of the annual contribution necessary to fund their yearly pension accrual.

c. We propose that the Clubs shall not be obligated to make pension contributions until a player has played 80 games in the NHL.

11. Insurance – We propose to continue to provide the life and career ending disability insurance coverages as at present. Players earning more than $350,000 will pay their own premiums.

12. Traded Players – We propose to delete paragraphs 4, 5 & 8 of the MOU and substitute an obligation to pay rent of up to $1,500 per month for two months or the earlier date on which the player is no longer obligated with regard to his former residence.

15. Roster Size – We propose that the active roster be 17 skaters and two goaltenders. We further propose that each Club be limited to a total of twenty-two players on its major league roster at any given time.

16. Per Diem Allowance – We propose to eliminate Article XVII.

17. Training Camp – We propose to delete a) paragraph 20.01 and substitute the obligation to provide transportation or reasonable travel expenses from the Club's home city to its training camp; b) the references to per them allowance in paragraph 20.02(d), (e) & (f); and (c) paragraph 20.03(a), (b), (c), and (d) and substitute the discretion of the NHL to permit veteran player mini-camps, and rookie and new coach training camps.

18. Player Discipline – We propose to increase the Commissioner's fining authority to $50,000. Suspensions shall result in the loss of 1/84 of annual salary per game suspended in the 1994-95 season and 1/82 thereafter.

19. Currency – We propose that upon the trade of a player between a Canadian Club and a U.S. Club, the amount of player's salary, bonuses and other financial benefits, if any, shall automatically be converted to the currency of the country to which the player was traded, at the rate of exchange then in effect as announced by the Wall Street Journal.

20. International Hockey – We propose to delete all references to the International Committee and substitute the NHL and delete paragraphs 16.01(c), 16.02 and 16.05.

21. Games 83-84 – We propose to delete, effective with 1995-96 season.

22. Player Appearances/Participation –

a. We propose to clarify paragraph 2 of the Standard Player's Contract to explicitly provide for up to eight appearances for any and all of the following:

(i) appearances on behalf of the League, including appearances at commercial establishments;

(ii) public service appearances and community service initiatives;

(iii) events (including hospitality, promotional and charity events) connected with the All Star Game, out of venue games in North America and over-seas, and other League related special events;

(iv) hockey clinics;

(v) special videotape projects and programs.

b. We propose to clarify paragraph 2 of the Standard Player's Contract to explicitly provide that:

(i) a player must make himself available to attend and participate in the Skills Competition and local youth hockey exhibitions;

(ii) a player must make himself available to attend and participate in all press conferences, including weekly, post-game and post-practice press brief-ings;

(iii) a player must make himself available to participate in the Hockey Hall of Fame Game. We further propose that the Hockey Hall of Fame Game will not be considered an exhibition game for purposes of any provision of the SPC or CBA.

23. Uniform and Equipment –

a. We propose to clarify that the League has the right to determine the type of outerwear and protective gear that players will wear on the ice, including the manufacture and brand name of such uniform and protective gear, as well as equipment.

b. We propose to clarify that the League has the right to require that all players wear only official Stanley Cup or Center Ice merchandise in the arena, practice areas, and all hockey related areas.

c. We propose to clarify that the League has the right to establish, for safety reasons, uniform standards for helmets and other on-ice equipment. Players will be required to use only equipment that satisfies these standards.

I emphasize that it is not our preference to proceed this way. Indeed, we prefer not to make any changes without the involvement and agreement of the NHLPA, It is only the NHLPA's consistent refusal to meet and negotiate which makes this action necessary. We would prefer to begin immediately, for as long as it takes, locked in a conference room with you, negotiating a new collective bargaining agreement. Until the NHLPA is prepared to join us in that effort, we have no alternative but to proceed on our own.

Very truly yours,
/s/
Jeffrey Pash

cc: Gary B. Bettman, Esq.

Supreme Court, U.S.
FILED
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No. 95-388

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, *et. al.*,

Petitioners,

—v.—

PRO FOOTBALL, INC. *d/b/a*
WASHINGTON REDSKINS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF LEAGUE OF VOLUNTARY HOSPITALS AND HOMES OF NEW YORK, REALTY ADVISORY BOARD ON LABOR RELATIONS, INC. AND TANKER SERVICE COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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February 16, 1996

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Amalgamated Meat Cutters & Butchers Workmen v. Wetterau Foods, Inc., 597 F.2d 133 (8th Cir. 1979) 11

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Brown v. Pro Football, Inc., 782 F. Supp. 125 (D.D.C. 1991), *rev'd*, 50 F.3d 1041 (D.C. Cir. 1995), *cert. granted*, 64 U.S.L.W. 3414 (U.S. December 8, 1995) (No. 95-388) 5, 10, 13

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Charles D. Bonanno Linen Serv. Inc. v. NLRB, 454 U.S. 404 (1982) 5-10, 15, 16

Chicago Midtown Milk Distribs., Inc. v. Dean Foods Co., 1970 Trade Cas. (CCH) ¶ 73,286 (7th Cir. 1970) 11

Circuit-Wise, Inc., 309 N.L.R.B. 905 (1992) 18

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Clune v. Publishers' Ass'n,
214 F. Supp. 520 (S.D.N.Y.),
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Colorado-Ute Elec. Ass'n, Inc. v. NLRB,
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Emhart Indus., Hartford Div. v. NLRB,
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Hi-Way Billboards, Inc.,
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Huck Mfg. Co. v. NLRB,
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Kennedy v. Long Island R.R. Co.,
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Local Union No. 47 v. NLRB,
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NLRB v. Beckham, Inc.,
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NLRB v. Charles D. Bonanno Linen Serv. Inc.,
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NLRB v. Katz,
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NLRB v. McClatchy Newspapers, Inc.,
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NLRB v. New York Typographical Union No. 6,
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NLRB v. Plainville Ready Mix Concrete Co.,
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NLRB v. Tex-Tan, Inc.,
318 F.2d 472 (5th Cir. 1963) 19

NLRB v. Truck Drivers Local Union No. 449,
353 U.S. 87 (1957) 6-8, 10, 18-20

National Basketball Ass'n. v. Williams,
45 F.3d 684 (2d Cir. 1995),
petition for cert. filed,
64 U.S.L.W. 3070 (U.S.
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Newspaper Drivers & Handlers' Local No. 372 v. NLRB, 404 F.2d 1159 (6th Cir. 1968), *cert. denied*, 395 U.S. 923 (1969) 11

Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991) 5, 10

Prepmore Apparel, Inc. v. Amalgamated Clothing Workers, 431 F.2d 1004 (5th Cir. 1970), *cert. dismissed*, 404 U.S. 801 (1971) 11

Retail Assocs., Inc., 120 N.L.R.B. 388 (1958) 9

Southwest Forest Indus., Inc. v. NLRB, 841 F.2d 270 (9th Cir. 1988) 16

Storer Communications., Inc., 294 N.L.R.B. 1056 (1989) 18

Taft Broadcasting Co., 163 N.L.R.B. 475 (1967), *enf'd sub nom. American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968) 14, 16

Tennessee Products & Chem. Corp. v. NLRB, 423 F.2d 169 (6th Cir.), *cert. denied*, 400 U.S. 822 (1970) 7

Transport Co. of Texas, 175 N.L.R.B. 763 (1969) 18

United Brick & Clay Workers v. Junction City Clay Co., 158 F.2d 552 (6th Cir. 1946) 11

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United Steelworkers v. Fort Pitt Steel Casting Div., 635 F.2d 1071 (3d Cir. 1980), *cert. denied*, 451 U.S. 985 (1981) 16

Wood v. National Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987) 12

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OTHER AUTHORITIES

Clarence E. Bennett, *Employers' Associations in the United States: A Study of Typical Associations* (1921) 6

Cox, *Labor and the Antitrust Laws—A Preliminary* Analysis, 104 U. Pa. L. Rev. 252 (1955) 11

No. 95-388

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ANTONY BROWN, *ET AL.*,

PETITIONERS,

VS.

PRO FOOTBALL, INC. D/B/A
WASHINGTON REDSKINS, *ET AL.*,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF LEAGUE OF VOLUNTARY HOSPITALS AND HOMES OF NEW YORK, REALTY ADVISORY BOARD ON LABOR RELATIONS, INC. AND TANKER SERVICE COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

This brief in support of respondents is submitted in accordance with Rule 37 of the Rules of this Court. The League of Voluntary Hospitals and Homes of New York, Realty Advisory Board on Labor Relations, Inc. and Tanker Service Committee, as *amici curiae*, have obtained and filed herewith the written consent of petitioners and respondents to the submission of this brief.

INTEREST OF AMICI CURIAE

Although this case arises out of a labor dispute in professional football, its implications far transcend the world of professional sports.

As discussed below, adoption of the position advocated by petitioners and their *amici* would render unlawful collective bargaining conduct routinely engaged in by multiemployer associations and thus entirely undermine the process of multiemployer bargaining, a method of labor-management negotiation that predated both the Sherman Act and the Wagner Act and has become the preferred and routinely accepted mode of collective bargaining in countless industries throughout the United States.

Amici curiae are associations of employers in industries other than professional sports, who, for decades, have engaged in multiemployer bargaining with their employees. Approximately 80,000 of *amici's* employees are presently covered by collective bargaining agreements negotiated on a multiemployer basis.

The League of Voluntary Hospitals and Homes of New York is a multiemployer association whose members operate 60 hospitals and nursing homes—of significantly disparate size—in the New York metropolitan area.[1] Since 1968, the League has engaged in collective bargaining on a multiemployer basis with Local 1199 of the National Health and Human Services Employees Union, and (since 1982) with Local 144 of the Hotel, Hospital, Nursing Homes and Allied Services Union, AFL-CIO. Both Local 1199 and Local 144 represent the full gamut of hospital employees, including clerical, service, maintenance, technical and professional workers. Thus, the positions their members hold at League institutions cover

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[1] The League's members include, for example, Presbyterian Hospital in the City of New York which has approximately 1,500 beds and almost 7,000 full-time employees, and Community Hospital of Brooklyn, Inc., which has only about 130 beds and 420 full-time employees.

an extraordinarily broad range of jobs, including housekeeping workers, nurses aides, clerks, secretaries, pharmacists, MSW social workers, laboratory technologists, radiology technologists and physical therapists. Taken together, these two unions represent approximately 46,000 employees who work at the League's member hospitals and nursing homes.

Over the course of their almost 30-year collective bargaining relationship, the League and Local 1199 have frequently reached an impasse in negotiations. In fact, in the last 20 rounds of bargaining, the parties have reached impasse on about 10 occasions (on average just about once every other bargaining round); and virtually without exception, the League, following impasse, has maintained in effect the employment terms of the expired labor contract until a new collective bargaining agreement was reached. On occasion, the League, after impasse, has unilaterally implemented revised terms. Indeed, in one round of bargaining, the League, following a lengthy strike, implemented revised terms of employment and maintained those revised terms in effect for the two years that were required for the parties to reach a new collective agreement.

The Realty Advisory Board on Labor Relations, Inc. ("RAB") is an organization of employers in the building service industry that, since at least 1979, has engaged in collective bargaining on a multiemployer basis with Local 32B-32J of the Service Employees International Union, AFL-CIO. The members of the RAB own or operate, *inter alia*, approximately 1,000 commercial buildings in the New York metropolitan area in which about 30,000 building service workers represented by Local 32B-32J are employed.

The Tanker Service Committee is a multiemployer association whose members are engaged in the operation of American-flag deep-sea vessels. For approximately 30 years, the Committee has engaged in collective bargaining on a multiemployer basis with District 1 of the Marine Engineers Beneficial Association/National Maritime Union ("MEBA") and District 4 of the Marine Engineers Beneficial Association/National Maritime Union ("NMU") (or their predecessor unions), and with the American Radio Association and

the Radio Officers Union. MEBA is the exclusive collective bargaining representative for all licensed engineers employed aboard the vessels operated by members of the Tanker Service Committee, and the NMU is the exclusive collective bargaining representative for all of the unlicensed personnel aboard those vessels. The American Radio Association and the Radio Officers Union represent radio officers. Approximately 4,000 individuals employed by the members of the Tanker Service Committee are covered by collective agreements negotiated on a multiemployer basis.

During the course of the multiemployer bargaining in which it has engaged, the Committee and one or more of the unions have reached impasse, and on most such occasions the Committee has maintained in effect the employment terms of the expired agreement until a new multiemployer contract was reached. In 1994, after negotiating for several months following the expiration of the agreement between the Committee and the NMU, the parties reached impasse and the Committee unilaterally implemented revised terms of employment that were continued in effect for a period of approximately two months until a new collective bargaining agreement was reached.

The interests of *amici curiae* are not represented by any of the parties to this appeal. Accordingly, we submit that by this brief the *amici curiae* provide an important and otherwise missing perspective to this Court.

SUMMARY OF ARGUMENT

Three Circuits of the United States Court of Appeals—the Second, Eighth and District of Columbia Circuits—have had the opportunity to evaluate the applicability of the antitrust laws to employment terms maintained in effect or unilaterally implemented by a multiemployer group after the expiration of a collective bargaining agreement and after the bargaining parties had reached (or were alleged to have reached) an impasse in negotiations. All three courts concluded that employees may not mount antitrust challenges so long as the unions they had designated as their exclusive bargaining representatives remained in a collective bar-

gaining relationship with their employers. Having chosen to form labor unions and to avail themselves of the benefits and protections of the federal labor laws, so each court reasoned, the employees' recourse was to the rights and economic weapons provided to them by those laws.

While the three Court of Appeals decisions—*Powell*,[2] *Williams*[3] and *Brown*—all arose out of labor disputes between professional athletes and sports leagues, the issues they presented have far broader implications. As demonstrated below, rejection of the principled approach reflected in these decisions and adoption of the positions advocated by petitioners and their *amici* would cripple if not destroy multiemployer bargaining, a longstanding method of labor negotiation that, as this Court has itself emphasized, is a "vital factor" in effectuating the national policy of promoting labor peace through strengthened collective bargaining. *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 409 (1982).

Petitioners here make no showing that multiemployer bargaining is any less "vital" today to the effectuation of this national policy than it was in 1982; and they advance no principled reason for denying to employers—who, with the consent of their union counterparts, bargain collectively on a group basis—the rights and privileges indisputably exercisable by individual employers as part of the collective bargaining process. Indeed, as is also shown below, petitioners and their *amici* propose nothing short of a "massive reshaping" of the collective bargaining regime intended by Congress. *Williams*, 45 F.3d at 691.

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[2] *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

[3] *National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3070, (U.S. July 24, 1995) (No. 95-137).

ARGUMENT

I.

Multiemployer Bargaining Is a "Vital Factor" in the Effectuation of the National Labor Policy that Promotes Labor Peace Through Collective Bargaining.

As this Court has remarked on at least two occasions, multiemployer bargaining is a practice that "long" antedated the Wagner Act. *Bonanno*, 454 U.S. at 409; *NLRB v. Truck Drivers Local Union No. 449* ("*Buffalo Linen*"), 353 U.S. 87, 94 (1957). Indeed, "[t]he existence of employer organizations that bargained with unions of employees pre-dated the passage of the Sherman Act in 1890." *Williams*, 45 F.3d at 689. *See* Clarence E. Bennett, *Employers' Associations in the United States: A Study of Typical Associations*, 21-22 (1921).

Although the National Labor Relations Act ("NLRA") makes no explicit reference to multiemployer bargaining, the language of the NLRA clearly contemplates that employers may participate in the bargaining process on a group basis. Thus, Section 2(2) of the NLRA, 29 U.S.C. § 159(2), defines "employer" as "any person acting as an agent of an employer, directly or indirectly," and Section 2(1), 29 U.S.C. § 159(1), defines "person" to include "associations." *Bonanno*, 454 U.S. at 406, 409.[4] And, in defining the rights and obligations of employers, the NLRA makes no distinction between the employer who participates in the collective bargaining process on its own and those who bargain on a group basis through multiemployer "associations."

As has been well recognized, multiemployer bargaining affords both management and labor a number of advantages that

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[4] Similarly, Section 4(b) of the Norris-LaGuardia Act, 29 U.S.C. § 104(b), bars the issuance of injunctions prohibiting any person from becoming or remaining "a member of any labor organization or of *any employer organization*." (Emphasis added.)

facilitate the collective bargaining process and thus foster labor peace. Indeed, the multiemployer mode of bargaining "has become perhaps as important for unions as for employers." *Id.* at 421 n.2 (Burger, C.J., dissenting). *See also id.* at 409 n.3; *Buffalo Linen*, 353 U.S. at 96.[5]

Thus, for example, multiemployer bargaining enables the development of industry-wide programs providing benefits to employees that individual employers might otherwise be unable (or unwilling) to provide. Additionally, by enabling unions (and employers) to concentrate their bargaining resources on the negotiation of a unitary, industry-wide contract, multiemployer bargaining "enhances the efficiency and effectiveness of the collective bargaining process and thereby reduces industrial strife." *Id.* at 410 n.3 (quoting *NLRB v. Charles D. Bonanno Linen Serv.*, 630 F.2d 25, 28 (1st Cir. 1980), *aff'd*, 454 U.S. 404 (1982)).[6]

As a practical fact, if not by definition, the multiemployer mode of bargaining posits that employers who are competitors in the output or product market will agree among themselves upon the terms and conditions that will govern the relationships with their employees. Indeed, multiemployer bargaining contemplates such joint conduct for the precise purpose of avoiding the disadvantages that competition in the labor market may cause. But, as the Court

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[5] Absent NLRB order, of course, multiemployer bargaining requires the consent of both labor and management. *See, e.g., NLRB v. American Printers & Lithographers*, 820 F.2d 878, 882 n.4 (7th Cir. 1987); *NLRB v. New York Typographical Union No. 6*, 632 F.2d 171, 183 (2d Cir. 1980); *NLRB v. Beckham, Inc.*, 564 F.2d 190, 192 (5th Cir. 1977); *Tennessee Products & Chem. Corp. v. NLRB*, 423 F.2d 169, 178 (6th Cir.), *cert. denied*, 400 U.S. 822, (1970).

[6] "[T]he limited funds and personnel of unions often make it very difficult for a union to negotiate separate agreements with each employer in industries where employer units are small." *Bonanno*, 454 U.S. at 421 n.2 (Burger, C.J., dissenting).

has made clear, that is not an evil. To the contrary, a cardinal benefit of multiemployer bargaining is that it enables members of the multiemployer unit to avoid "the competitive disadvantages resulting from nonuniform contractual terms." *Buffalo Linen*, 353 U.S. at 96. Indeed, as the National Labor Relations Board (the "NLRB" or "Board") maintained in *Bonanno*, multiemployer bargaining enables employers to make concessions "'without fear that other employers will refuse to make similar concessions to achieve a competitive advantage.'" *Bonanno*, 454 U.S. at 410.

Not surprisingly, in light of these advantages, multiemployer bargaining has become "the preferred bargaining mechanism" in many industries. *Id.* at 410. In the mid-1950's, approximately four million employees were covered by collective bargaining agreements signed by unions with "thousands of employer associations." *Buffalo Linen*, 353 U.S. at 95. By 1980, over 40% of "major" collective bargaining agreements (*i.e.*, those covering 1,000 or more employees) were multiemployer agreements. *Bonanno*, 454 U.S. at 410.

Multiemployer bargaining has also received direct congressional approval. Thus, at the time of the Taft-Hartley debates, Congress rejected proposals to limit or outlaw multiemployer bargaining—proposals that were greeted "with a storm of protest that their adoption would tend to weaken and not strengthen the process of collective bargaining and would conflict with the national labor policy of promoting industrial peace through effective collective bargaining." *Buffalo Linen*, 353 U.S. at 95; *Bonanno*, 454 U.S. at 409.

According to the Court, those debates "demonstrate[d] that Congress refused to interfere with such bargaining because there was cogent evidence that in many industries the multiemployer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *Buffalo Linen*, 353 U.S. at 95; *Bonanno*, 454 U.S. at 409.

The long history of multiemployer bargaining, the refusal by Congress to outlaw or limit the practice, the significant advantages

that accompany the multiemployer mode of bargaining, the widespread utilization of the mechanism, and the "cogent evidence" of the "vital" role multiemployer bargaining has played in the effectuation of national labor policy have led this Court, the lower federal courts, and the NLRB consistently to reject efforts (whether mounted by labor or management) that would undermine the integrity or stability of multiemployer bargaining units.

Thus, since 1958, the Board's rules ("reflect[ing] an increasing emphasis on the stability of multiemployer units," *Bonanno*, 454 U.S. at 410-11) have barred both employers and unions from withdrawing from multiemployer bargaining once negotiations have commenced absent mutual consent or special circumstances. *See, e.g., Retail Assocs., Inc.*, 120 N.L.R.B. 388 (1958); *Bonanno*, 454 U.S. at 410-11. In *Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22 (1973), *enforcement denied*, 500 F.2d 181 (5th Cir. 1974), the Board held that an impasse in negotiations was not a "special circumstance" that permitted withdrawal—a position subsequently adopted by this Court in *Bonanno*.

In *Bonanno*, impasse had been reached more than six months before the employer gave notice of its purported withdrawal from the multiemployer unit, that employer had been the target of a selective strike (and had hired replacements), and most of its fellow association members had locked out their employees for some five months. 454 U.S. at 407-08. Notwithstanding these circumstances, the Court approved the Board's rationale that there was "little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways." *Id.* at 412.[7] Adopting the Board's conclusion that "permitting withdrawal at impasse would as a practical matter undermine the utility

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[7] The Court came to this conclusion over the dissent of Chief Justice Burger, who characterized the record facts as showing "no signs that the parties would return to the bargaining table," and as reflecting "no 'temporary deadlock or hiatus in negotiations,'" but rather "a complete breakdown in negotiations coupled with a prolonged strike and lockout." *Bonanno*, 454 U.S. at 422.

of multi-employer bargaining" (*id.*), the Court emphasized that the "proper and pre-eminent goal" was "[m]aintaining the stability of the multiemployer unit." *Id.* at 419.

Preservation of the integrity of the multiemployer bargaining unit was, of course, justification for the multiemployer lockout in *Buffalo Linen*, 353 U.S. at 93-94; and it was "the key" (*Bonanno*, 454 U.S. at 419) to the Court's decision in *NLRB v. Brown*, 380 U.S. 278 (1965), finding no unfair labor practice when the members of a multiemployer unit hired temporary replacements following a lockout.

While these cases arose under the federal labor laws, they surely involved conduct that, if antitrust principles applied, constituted price-fixing and a group boycott, *per se* violations of the Sherman Act. *Williams*, 45 F.3d at 692. But it is worthy of note that there is not even a hint in the Court's opinions that conduct permitted under the federal labor laws (including even a lockout, a weapon not expressly authorized by the statutory language, *Buffalo Linen*, 353 U.S. at 92) could expose the members of a multiemployer unit to antitrust liability. Nor do these cases suggest that members of a multiemployer unit do or should—because of the antitrust laws or otherwise—enjoy less than the full range of rights and privileges under the labor laws because they bargain on a group basis.

Indeed, and even apart from the "sports" trilogy of *Powell*, *Williams*, and *Brown*, when such arguments have been advanced and the antitrust laws specifically invoked, the federal courts have uniformly rejected the contention.

Thus, in *Kennedy v. Long Island Rail Road Co.*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963), the Second Circuit rejected a Sherman Act challenge to a multiemployer strike insurance fund, holding that the fund "was an instrument of self-help properly employed in the process of collective bargaining." *Id.* at 371. In *Clune v. Publishers' Ass'n*, 214 F. Supp. 520 (S.D.N.Y.), *aff'd*, 314 F.2d 343 (2d Cir. 1963), the Second Circuit affirmed the district court's holding that a multiemployer lockout of its unionized

employees was not a "group boycott" under the antitrust laws, but was instead conduct sanctioned by federal labor policy. *Accord Chicago Midtown Milk Distrs., Inc. v. Dean Foods Co.*, 1970 Trade Cas. (CCH) ¶ 73,286 (7th Cir. 1970); *Newspaper Drivers & Handlers' Local No. 372 v. NLRB*, 404 F.2d 1159 (6th Cir. 1968), *cert. denied*, 395 U.S. 923 (1969).

Similarly, in *Amalgamated Meat Cutters & Butchers Workmen v. Wetterau Foods, Inc.*, 597 F.2d 133, 136 (8th Cir. 1979), the Eighth Circuit held that the replacement of striking workers "cannot constitute a violation of the antitrust law" because this is conduct that "[f]ederal labor policy sanctions." *Accord United Brick & Clay Workers v. Junction City Clay Co.*, 158 F.2d 552 (6th Cir. 1946). Likewise, in *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers*, 431 F.2d 1004 (5th Cir. 1970), *cert. dismissed*, 404 U.S. 801 (1971), the Fifth Circuit rejected an antitrust claim asserting that multiple employers, in retaliation for a strike, had refused to deal with the union concerning wages and working conditions. *See also California State Council of Carpenters v. Associated Gen. Contractors, Inc.*, 107 L.R.R.M. 2724, 2725 (9th Cir. 1981) ("although multiemployer bargaining units may affect or restrain competition in the area of wages and working conditions, such restraints will not be considered to violate the antitrust laws"); *Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co.*, 475 F. Supp. 482 (S.D.N.Y. 1979) (rejecting antitrust claim based upon alleged conspiracy to fix wages and discriminate against employees favoring unionization), *vacated as moot*, 638 F.2d 7 (2d Cir. 1980).

In sum, as both Congress and the courts have recognized, multiemployer bargaining has long been a fundamental feature of the collective bargaining process and an essential element of national labor policy. Assuming *arguendo* that antitrust policy should be concerned at all with disputes that involve only the labor market,[8]

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[8] *But see* Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 254 (1955) ("No one seriously suggests that antitrust policy should be concerned with the labor

the antitrust laws have not been—and should not in this case be—allowed to subvert fundamental principles of federal labor policy. *See Wood v. National Basketball Ass'n*, 809 F.2d 954 (2d Cir. 1987).

II.

Adoption of the Positions Advanced by Petitioners Would Undermine Multiemployer Bargaining and Thus Subvert Fundamental Principles of Federal Labor Policy.

Despite the "vital" role multiemployer bargaining plays in the effectuation of national labor policy, petitioners would construct a separate collective bargaining regime for the multiemployer method of negotiation. More specifically, petitioners and their *amici* would expose the members of multiemployer groups to treble damage antitrust liability for conduct that is not only licensed by federal labor law, but which constitutes a routine—indeed, essential—part of the collective bargaining process. As demonstrated below, there is no justification for this position or for the destruction of the multiemployer bargaining process it would cause.

Petitioners contend principally that the members of a multiemployer bargaining unit should be exposed to antitrust liability for any concerted conduct taken with respect to the terms of employment—including even the maintenance of the *status quo*—at the moment the collective bargaining agreement expires.[9] Alternatively, they propose that antitrust liability may attach to joint employer conduct—whether that conduct be maintenance of the *status quo* or the implementation of new terms of employment—when the parties have reached their first bargaining impasse.[10]

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market *per se*").

[9] Brief for Petitioners ("Pet. Br.") at 45-47.

[10] *Id.* at 47-48.

The Department of Justice and the Federal Trade Commission, as *amici*, urge what seems properly characterized as an "impasse-plus" test, suggesting that any concerted conduct by the members of a multiemployer group be subject to antitrust scrutiny once the employers have had a reasonable opportunity to consult with counsel (so as to determine that impasse has in fact occurred) and to adjust their business operations in order "to eliminate" any "restraint"—not just refrain from the imposition of *new* employment terms—that could give rise to antitrust liability.[11]

None of these proposed standards can be squared with fundamental principles of federal labor policy; and each would undermine, if not destroy, the practice of multiemployer bargaining, a "vital" element of that national policy.

But for the opinion of the district court that was reversed by the decision on appeal,[12] petitioners' principal contention—that antitrust exposure should attach to any concerted conduct affecting the terms of employment as soon as the collective bargaining agreement expires—has been rejected by every court to address the issue. And it is rejected in this very case by the Department of Justice and Federal Trade Commission.[13] The reason is plain: following expiration of a collective bargaining agreement and at least until impasse, employers are *required* to maintain the *status quo* by adhering to the previously bargained terms of employment. *See Laborers Health & Welfare Trust Fund v. Advanced Lightweight*

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[11] Brief for the United States and the Federal Trade Commission as *Amici Curiae* Supporting Petitioners ("U.S. Br.") at 24.

[12] *Brown v. Pro Football, Inc.*, 782 F. Supp. 125 (D.D.C. 1991), *rev'd*, 50 F.3d 1041 (D.C. Cir. 1995), *cert. granted*, 64 U.S.L.W. 3414 (U.S. December 8, 1995) (No. 95-388).

[13] *See* U.S. Br. at 16-17.

Concrete Co., 484 U.S. 539, 544 n.6 (1988); *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962).[14]

Nor is there any merit to petitioners' suggestion[15] that union consent to a change in the *status quo* (or, more accurately, a union's demand, backed by the threat of antitrust litigation, for the elimination of an employment term to which it had previously agreed but now views as a "restraint") would do no offense to the NLRA's bargaining scheme.

The *status quo* obligation is not intended merely to protect the interests of unions or employers; rather, "[f]reezing the status quo ante after a collective agreement has expired [is intended to] promote[] industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract." *Laborers Health & Welfare Trust Fund*, 484 U.S. at 545. *See also Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198, 203 (1991) (purpose of *status quo* obligation is to facilitate good faith collective bargaining). Conduct that is *required* by federal labor law cannot violate the antitrust laws.

Nor, for several reasons, should this Court adopt either petitioners' alternative contention that impasse marks the moment when concerted conduct by a multiemployer group becomes subject to antitrust attack or the Government's nebulous "impasse-plus" standard.

First, as even the Government appears to acknowledge, there is often considerable uncertainty as to whether negotiations have reached an impasse—such uncertainty, in fact, that the Board

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[14] Even after impasse, employers are unquestionably permitted by the NLRA to maintain the *status quo*. *See, e.g.*, *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982); *Taft Broadcasting Co.*, 163 N.L.R.B. 475 (1967), *enf'd sub nom. American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

[15] Pet. Br. at 45-47.

and different courts (and even different members of the same court)—as well as the lawyers the Government urges members of a multiemployer group to consult—might well reach different determinations on the matter.[16] Indeed, even within the course of a single labor dispute, an impasse can be reached on multiple occasions (and, by definition, broken with the same frequency).[17] As this Court emphasized in *Bonanno*:

> As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations "which in almost all cases is eventually broken, through either a change of mind or the application of economic force.

454 U.S. at 412 (quoting the NLRB).

In short, the transitory, if not ephemeral, nature of a bargaining impasse makes that stage of the collective bargaining process especially *un*suitable as a point of demarcation, even if employers dutifully seek legal advice. *Cf. Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 64 (2d Cir. 1979) (existence of impasse is a "[complex] question of fact").

Second, the argument advanced by petitioners and their *amici* that there is no need to accommodate the federal labor laws once impasse has been reached[18] is premised upon a mistaken view of both the nature and significance of a bargaining impasse.

At impasse, an employer, to be sure, is no longer required to maintain the *status quo* and may unilaterally implement revised terms of employment; and the members of a multiemployer unit may enter into interim agreements with the union. But impasse

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[16] *See, e.g., Bonanno*, 454 U.S. at 426 (Burger, C.J., dissenting).

[17] *See, e.g.*, U.S. Br. at 23-24.

[18] *See* Pet. Br. at 37-38; U.S. Br. at 7.

neither rids an employer of its duties under the federal labor laws, nor eliminates the need to continue to accord full reign to national labor policy.

In the first instance, impasse does not leave the employer free to implement whatever new terms and conditions of employment it may desire. Whatever the source of the unilateral implementation right, that right is circumscribed by the cardinal federal labor law principle that the terms implemented may be only those reasonably comprehended by the employer's last proposal to the union.[19] Indeed, while an employer, before a union enters the picture, may be exercising a purported common law right to set the terms of employment, *Katz*, 369 U.S. 736, teaches that once the union is recognized and collective bargaining begins—once, that is, a collective bargaining relationship has been established—the NLRA forbids the employer from changing those terms prior to impasse notwithstanding their supposed common law origin.

Nor does the fact that a member of a multiemployer unit may at impasse enter into an interim agreement with the union change the equation. Even after such an interim agreement is signed, the "pre-eminent goal" of the labor laws remains the stability of the multiemployer unit and thus the multiemployer group may continue to insist "that parties remain subject to unit negotiations in accordance with their original understanding." Moreover, as this Court made clear in *Bonanno*, impasse does not "initiate any right to execute an [interim] agreement inconsistent with the duty to abide by the results of group bargaining." *Bonanno*, 454 U.S. at 415, 416, 419.

By insisting that members of a multiemployer group, at expiration or impasse, act individually, petitioners and their *amici*

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[19] *See, e.g., Emhart Indus., Hartford Div. v. NLRB*, 907 F.2d 372, 377 (2d Cir. 1990); *Southwest Forest Indus., Inc. v. NLRB*, 841 F.2d 270, 273 (9th Cir. 1988); *United Steelworkers v. Fort Pitt Steel Casting Div.*, 635 F.2d 1071, 1078 (3d Cir. 1980), *cert. denied*, 451 U.S. 985 (1981); *Taft Broadcasting Co.*, 163 N.L.R.B. at 478.

utterly disregard these principles. Rather than fostering the "pre-eminent goal" of unit stability, they would stand the labor laws on their head and *require* conduct (*e.g.*, unilateral implementation of new terms on an individual basis) that would subvert such stability. If impasse is not a special circumstance justifying an employer's withdrawal from a multiemployer unit, and if the employer's right at impasse to enter into an interim agreement leaves it with a "duty to abide by the results of group bargaining," impasse simply cannot mark the time when the members of a multiemployer unit become forbidden from further joint conduct with respect to employment terms (or, as the Government suggests,[20] from even discussing matters designed to preserve the integrity of the unit).

Nor is there merit to petitioners' characterization of unilateral implementation as an end in itself or to their efforts to distinguish unilateral implementation from other economic weapons concededly available to multiemployer units at various stages of the bargaining process.

In *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316-17 (1965), this Court recognized that the unilateral imposition of employment terms was one of the economic weapons employers were permitted to utilize by the labor laws. Other federal courts and the Board have adopted the same characterization. *See, e.g., NLRB v. Plainville Ready Mix Concrete Co.*, 44 F.3d 1320, 1340 (6th Cir.), *cert. denied*, 116 S. Ct. 474 (1995); *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1164 (D.C. Cir. 1992) (Edwards, J., statement accompanying *per curiam* opinion); *Colorado-Ute Elec. Ass'n, Inc. v. NLRB*, 939 F.2d 1392, 1404 (10th Cir. 1991), *cert. denied*, 504 U.S. 955 (1992); *Local Union No. 47 v. NLRB*, 927 F.2d 635, 645 (D.C. Cir. 1991); *Hi-Way Billboards*, 206 N.L.R.B. at 23.

Moreover, petitioners' contention that unilateral implementation is principally designed to serve the employer's business interests rather than to influence the bargaining process conflicts directly with

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[20] *See* U.S. Br. at 18.

the principle that unilateral implementation may, indeed, serve to end an impasse and revive the parties' bargaining duty that was, at impasse, only *temporarily* suspended. *See, e.g.*, *Fort Pitt Steel*, 635 F.2d at 1078; *Hi-Way Billboards*, 206 N.L.R.B. at 23; *Circuit-Wise, Inc.*, 309 N.L.R.B. 905, 921 (1992); *Storer Communications, Inc.*, 294 N.L.R.B. 1056, 1090 (1989); *Transport Co. of Texas*, 175 N.L.R.B. 763, n.1 (1969).[21]

Although petitioners would disable the members of a multiemployer bargaining unit from agreeing among themselves to maintain the *status quo* or to implement new terms of employment when the labor laws clearly permit them to do so, they would permit those very same multiemployers (*see* Pet. Br. at 40) to commit themselves to joint bargaining positions, hire replacement workers, contribute to a strike insurance fund, withdraw benefits contained in an expired agreement—and, indeed, even lock out their employees.[22] There is simply no principled basis for this argument.

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[21] The reaching of impasse obviously signifies the temporary inability of the bargaining parties to reach an agreement. While the employer is then licensed to impose employment terms (either by continuing the provisions of the expired agreement or by implementing new terms), it can gain the assurance of labor peace that a no-strike provision affords only by reaching a new agreement with the union. Thus, unilateral implementation is most often a device designed to cause the union to reconsider its bargaining position and thereby stimulate further negotiation; and the terms imposed are almost always more stringent or less charitable than those the employer is prepared to accept as part of an agreement with a no-strike commitment that assures labor peace.

[22] Citing *Buffalo Linen*, 353 U.S. at 97, petitioners suggest that the members of a multiemployer unit can lock out their employees only "as a defensive measure to protect the integrity of the unit." *See* Pet. Br. at 40 n.25. But they ignore, in this context, the Court's holding in *American Ship*, 380 U.S. at 301-02, 310-11, that an employer does not commit an unfair labor practice by locking out its employees solely to bring economic pressure in support of its bargaining position. There is in *American Ship* no suggestion that the

In defense of their approach, petitioners urge the Court to draw a distinction between "terms" and "tactics," and to exclude from the category of "tactics" the employer's right, after impasse, to maintain the *status quo* or unilaterally implement new terms of employment. But the supposed distinction between terms and tactics is one for which petitioners offer no case support (but for the dissent below); and their corollary of convenience—that an employer's imposition of terms is not an economic weapon—is, as demonstrated above, a long-discredited notion.[23]

The collective bargaining regime petitioners and their *amici* would construct exclusively for the multiemployer bargaining process not only departs from that intended by Congress; it would

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labor law rights of single employers and multiemployer units would differ in this regard. Indeed, the Court described the question presented in *American Ship* as "that expressly reserved in" *Buffalo Linen*, without even a hint (although *Buffalo Linen* involved a multiemployer group) that the nature of the employer unit might make the slightest difference. *See* 380 U.S. at 301-02.

[23] In her dissent, Judge Wald acknowledged that in *American Ship*, 380 U.S. at 316, this Court itself had "suggested that post-impasse unilateral imposition of terms may qualify as an economic pressure tactic." Pet. App. 53a-54a. Citing *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472, 480-81 n.20 (5th Cir. 1963), however, she opined that an employer's right to unilaterally impose terms after impasse was "best understood not as a 'bargaining tactic' but as part of the employer's residual right to continue operating as dictated by business necessity once her statutory duty to bargain has been exhausted." Pet. App. 53a-54a. In *Tex-Tan*, a case decided two years before *American Ship*, the employer did, indeed, institute wage changes that it described as "a matter of economic necessity" (318 F.2d at 480), but the Court of Appeals (citing *Katz*, 369 U.S. at 745) was quick to point out that even after impasse the employer had ""no license to grant wage increases greater than any he has ever offered the union at the bargaining table . . . ."" *Tex-Tan*, 318 F.2d at 481 n.20.

rob the members of multiemployer units of what this Court has found to be an essential benefit of that process—the ability to avoid "the competitive disadvantages resulting from non-uniform contractual terms" (*Buffalo Linen*, 353 U.S. at 96)—while simultaneously exposing them to treble damage antitrust liability that their single employer counterparts do not face.

Under petitioners' construct, the members of a multiemployer group, while able to "commit" to a joint bargaining position, would lack the power to enforce that commitment. Indeed, they could avoid antitrust exposure after contract expiration or impasse only if their concerted conduct resulted in an acceptance of the union's demands. If, instead of accepting a union proposal for a $10 per hour increase, the multiemployer group's members, rather than shutting down their industry, elected to continue the wage scale called for by the expired collective agreement until a new labor contract was reached, or proceeded to implement a $9 per hour increase, petitioners would (notwithstanding their invitation to a rule of reason trial) surely assert that the group's conduct constituted a *per se* violation of the Sherman Act.

With the knowledge that the multiemployer groups facing them across the bargaining table would risk antitrust liability for maintaining the old terms or implementing new ones once impasse was reached, unions would have powerful motive to bargain in a manner designed to create an impasse at the earliest possible time and present the employers with the Hobson's choice of defending an antitrust litigation or entering into interim agreements, on terms acceptable to the union, that would whipsaw them one by one into submission.

Faced with such a choice, no rational employer would voluntarily bargain on a group basis. As a consequence, the salutary benefits—for both management and labor—of multiemployer bargaining, a mode of collective bargaining "vital" to the effectuation of national labor policy, would be sacrificed. Petitioners present no justification for such a result.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that the judgment of the Court of Appeals should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, *et. al.*,

Petitioners,

—v.—

PRO FOOTBALL, INC. *d/b/a*
WASHINGTON REDSKINS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NATIONAL BASKETBALL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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857 F. Supp. 1069 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2d Cir.), *petition for cert. filed*, 64 U.S.L.W. 3070 (July 24, 1995) . . . . . *passim*

National Basketball Players Ass'n,
4 Adv. Mem. Rep. ¶ 10,037
(Jan. 26, 1976) 23

National Football League v. North Am. Soccer League,
459 U.S. 1074 (1982) 18

National Football League Management Council,
203 N.L.R.B. 958 (1973), *rev'd on other grounds*, *National Football League Players Ass'n v. NLRB*,
503 F.2d 12 (8th Cir. 1974) 18

NCAA v. Board of Regents,
468 U.S. 85 (1984) 17

Newspaper Printing Corp. v. NLRB,
625 F.2d 956 (10th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981) 12

NLRB v. Allis-Chalmers Mfg. Co.,
388 U.S. 175 (1967) 19

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NLRB v. Crompton-Highland Mills, Inc.,
337 U.S. 217 (1949) 10

NLRB v. Insurance Agents Int'l Union,
361 U.S. 447 (1960) 21

NLRB v. Katz,
369 U.S. 736 (1962) 9, 10

NLRB v. Truck Drivers Local Union No. 449,
353 U.S. 87 (1957) 16

NLRB v. Washington Aluminum Co.,
370 U.S. 9 (1962) 21

North Am. Soccer League v. NLRB,
613 F.2d 1379 (5th Cir.),
cert. denied, 449 U.S. 899 (1980) 17-18

Powell v. National Football League,
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Powell v. National Football League,
930 F.2d 1293 (8th Cir. 1989),
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Retlaw Broadcasting Co.,
1994 NLRB LEXIS 1074 (Dec. 30, 1994) 12

Reynolds v. National Football League,
584 F.2d 280 (8th Cir. 1978) 17

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Taft Broadcasting Co.,
163 N.L.R.B. 475 (1967), *enf'd sub nom.*
American Fed'n of Television
& Radio Artists v. NLRB,
395 F.2d 622 (1968) 14

Whitin Machine Works,
108 N.L.R.B. 1537, *enf'd*,
217 F.2d 593 (4th Cir. 1954),
cert. denied, 394 U.S. 905 (1955) 12

Wood v. National Basketball Ass'n,
809 F.2d 954 (2d Cir. 1987) 8

STATUTES

National Labor Relations Act,
29 U.S.C. § 151 *et seq.* 4

National Labor Relations Act,
29 U.S.C. § 158(d) 19

National Labor Relations Act,
29 U.S.C. § 159(a) 19

OTHER AUTHORITY

I Patrick Hardin, *The Developing Labor Law* 697
(3d ed. 1992) 12

No. 95-388

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ANTONY BROWN, *ET AL.*,

PETITIONERS,

VS.

PRO FOOTBALL, INC. D/B/A
WASHINGTON REDSKINS, *ET AL.*,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NATIONAL BASKETBALL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The National Basketball Association ("NBA" or "League") submits this brief as *amicus curiae* in support of Respondents National Football League, *et al.* Both petitioners and respondents have provided written consent to the filing of this brief; copies of these consents are filed herewith.

INTEREST OF THE NBA

The NBA, comprised of 29 member teams, is an integrated business venture that engages in the production and marketing of

NBA Basketball. Because of the necessity of uniform terms and conditions of employment governing players in professional team sports, the NBA, for the past 30 years, has bargained as a single unit with the union representing NBA players, the National Basketball Players Association ("NBPA" or "Union"). Since the NBA and the NBPA commenced their labor relationship in 1965, they have entered into twelve consecutive collective bargaining agreements. The parties' 1988 Collective Bargaining Agreement expired by its terms on June 23, 1994.

At the outset of the 1994 negotiations, the NBPA demanded, among other things, the immediate elimination of three long-standing NBA employment terms that had been incorporated in the 1988 Agreement -- the NBA Draft, Revenue Sharing/Salary Cap System, and Right of First Refusal.[1] The NBPA expressly threatened -- as it had done in prior rounds of collective bargaining -- that if the League so much as maintained these employment terms in effect while the parties bargained toward a new agreement, the Union would organize and finance an antitrust lawsuit against the NBA seeking injunctive relief and treble damages. In light of this effort by the Union to use the antitrust laws as leverage in collective bargaining, the NBA itself filed a declaratory judgment action against the NBPA and its members seeking a declaration that the parties' dispute over terms and conditions of employment was governed exclusively by the federal labor laws, and not the antitrust

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[1] The NBA Draft is the method by which the negotiating rights to the best collegiate and other incoming players are allocated among NBA teams; the teams with the worst won-loss records generally receive the best selections. The Revenue Sharing/Salary Cap System is an overall wage system that allocates to the players as a whole an agreed-upon percentage of the League's gross revenues, and requires teams to establish their player payrolls in accordance with an agreed-upon maximum and minimum team salary. The Right of First Refusal permits a team to match an offer made to one of its current players by another team and thus to retain that player's services. *See National Basketball Ass'n v. Williams*, 45 F.3d 684, 686 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3070 (U.S. July 24, 1995) (No. 95-137).

laws. *National Basketball Association v. Williams*, 94 Civ. 4488 (S.D.N.Y.). The NBPA and the player-class immediately filed antitrust counterclaims for injunctive relief and treble damages.

On July 18, 1994, the district court granted the declaratory relief sought by the NBA and denied the NBPA's counterclaims. The court held that "where a collective bargaining relationship exists, federal labor law applies to the disputes that arise between the bargaining parties." *Williams*, 857 F. Supp. 1069, 1074 (S.D.N.Y. 1994). The Second Circuit affirmed, concluding that the players' antitrust claim directly conflicts with "collective bargaining [as] intended by Congress. . . . What limits on [the NBA's] conduct that exist are found in the labor laws." *Williams*, 45 F.3d 684, 693 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3070 (U.S. July 24, 1995) (No. 95-137). The Second Circuit's analysis of the interplay between the federal labor and antitrust laws was relied upon and quoted at length in the D.C. Circuit's decision below. *See* Petitioners' Appendix ("Pet. App.") 5a, 22a, 25a-28a.

The NBA's interest in this case is therefore unique and significant. In determining the nature and scope of the labor exemption to the antitrust laws and, specifically, its application to a multiemployer unit's labor law right to impose terms and conditions of employment after impasse, it is critical for the Court to decide whether the exemption also applies to the unit's maintenance of the *status quo*. Indeed, petitioners and their *amici* have correctly asserted that the "endpoint" of the labor exemption is "the most important and recurring issue" raised by this case, and have expressly urged the Court to adopt a legal standard that would overturn the decision in *Williams*. Petitioners' Brief ("Pet. Br.") at 45, 37-48; *accord, e.g.*, United States Brief ("U.S. Br.") at 9-26. Accordingly, the NBA has a clear interest in focusing on the *status quo* issue and explaining why the analysis set forth in both *Williams* and the decision below should be upheld.[2]

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[2] The NBA and the NBPA settled the labor dispute underlying the *Williams* litigation by agreeing upon the terms of a new six-year collective bargaining agreement. The parties have also

The NBA also has substantial practical experience with collective bargaining in professional sports. We can therefore assist the Court in understanding how unionized professional athletes have attempted to use antitrust litigation to gain leverage in collective bargaining, how such litigation subverts and disrupts the process for resolving labor disputes established by the federal labor laws, and why the various positions advanced by petitioners and their *amici* directly conflict with both the labor law process and the practice of multiemployer bargaining in the professional sports industry.

SUMMARY OF ARGUMENT

The question presented in this case is whether employees who have formed a union and voluntarily invoked the collective bargaining process in order to obtain the most favorable terms and conditions of employment should, at the same time, be able to use the antitrust laws to challenge employer conduct that is a fundamental part of that process and authorized by the labor laws. In answering this question in the negative, all three courts of appeal to have addressed the issue have advanced the same fundamental analysis: in the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"), Congress established a comprehensive and evenhanded process for the resolution of labor disputes; this process would be fatally undermined if courts, in the guise of determining antitrust "reasonableness," were allowed to intrude and outlaw employment terms or other conduct authorized by the labor laws; the business competition concerns of the Sherman Act are not directed at restraints in a labor market, especially those resulting from collective bargaining between unionized employees and a multiemployer unit;

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agreed that the pending petition for a writ of certiorari in *Williams* will be withdrawn once the language of the new collective agreement is finalized, and, with the players' consent, the Court has on several occasions extended the time for the NBA to respond to the petition in order to accommodate the parties' efforts. Based on the Court's most recent order (dated February 8, 1996), the NBA's time to respond has been extended to April 8, 1996.

accordingly, by virtue of the so-called "labor exemption," the antitrust laws have no application to "restraints on competition imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining." Pet. App. 29a; *accord Williams*, 45 F.3d 684; *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991). This plainly correct analysis is carefully delineated in respondent NFL's brief, which the NBA joins in full.

Petitioners and their *amici* attack the decision below, but offer no coherent analytical framework to take its place. For example, petitioners and the various players associations contend that the labor exemption is predicated solely on union consent to the challenged restraint, but then expressly concede that the antitrust laws cannot apply to a lockout, the hiring of replacement workers, or the withdrawal of benefits after impasse -- all of which are "restraints" adopted pursuant to the labor laws to which a union does *not* consent. *See* Pet. Br. at 18-30, 40; Players Associations' Brief ("PA Br.") at 15, 18-24. The government, after expressly rejecting petitioners' "consent" theory, U.S. Br. at 16, argues that antitrust courts should be free to intrude on the collective bargaining process immediately upon impasse, while at the same time acknowledging that Congress intended the labor law process to be free of exactly this kind of governmental interference. U.S. Br. at 20-21. Ultimately, neither petitioners nor their *amici* can resolve the fundamental incompatibility between an antitrust cause of action, which is intended to redress or prohibit unreasonable restraints on competition in a business market, and the labor law process, which obligates the parties to discuss -- and is intended to help them agree upon -- these self-same restraints in a labor market.

All parties agree that the Sherman Act must yield to the later-enacted NLRA if the "application of the antitrust laws affirmatively 'conflicts with' the NLRA's collective bargaining scheme." Pet. Br. at 17. But the proposals advanced by petitioners and their *amici* for termination of the labor exemption would create just such a conflict. Petitioners' claim that the exemption should terminate at expiration of the collective bargaining agreement

conflicts with the employers' labor law obligation to maintain the *status quo* until impasse. The government's claim that the exemption should terminate at impasse conflicts with the employers' continuing right to maintain the *status quo* and the parties' fundamental duty to bargain in good faith over mandatory subjects. Both arguments also conflict with the well-settled practice of multiemployer bargaining, especially in a professional sports league like the NFL or NBA where the member teams *must* establish common employment terms to produce their integrated entertainment product.

Petitioners' arguments are also based on a wholly unfounded premise: that unionized employees have an antitrust right to negotiate their salaries and other employment terms on an individual basis. As the NLRA makes clear, however, once employees have selected a union to act as their exclusive bargaining representative, those employees must negotiate their terms and conditions of employment only on a *collective* basis; thus, any right they may acquire to engage in individual salary negotiations derives solely from the labor law process. In their more candid moments, petitioners' *amici* concede the point: the purpose of player antitrust litigation is not to vindicate any underlying antitrust rights or to further antitrust policy, but to obtain additional leverage at the bargaining table. *See, e.g.,* U.S. Br. at 22. Because, as a practical matter, labor-management disputes over terms and conditions of employment must inevitably be resolved pursuant to the policy and process of the federal labor laws, such disputes raise no issue of antitrust policy at all.

Finally, petitioners' assertion that the absence of the antitrust weapon will lead to increased disruption in labor-management relations is fundamentally misconceived. The "disruptive" conduct about which petitioners complain -- strikes, lockouts, and other uses of economic force -- is both permitted and regulated by the NLRA. If Congress believed that such action warranted intervention by the federal courts, rather than continued adherence to the collective bargaining process, it would have provided such a remedy in the federal labor laws. In any case, petitioners have it exactly backwards: it is the presence, not the absence, of wasteful,

burdensome, and time-consuming antitrust litigation that has disrupted the orderly process of negotiating and resolving collective bargaining agreements in the professional sports industry.

ARGUMENT

I. ALLOWING UNIONIZED EMPLOYEES TO USE ANTITRUST LITIGATION AS A WEAPON IN COLLECTIVE BARGAINING WOULD CLEARLY CONFLICT WITH THE EVENHANDED PROCESS FOR RESOLVING LABOR DISPUTES ESTABLISHED BY CONGRESS IN THE NLRA

A. The Antitrust Laws Cannot Apply To Collective Bargaining Conduct If They Conflict With The Federal Labor Laws.

Even if the Sherman Act was intended to apply to labor market restraints or, more particularly, to multiemployer bargaining conduct (which it plainly was not, *see* NFL Brief; Pet. App. 24a-29a), the relevant inquiry in this case is whether the application of the antitrust laws to restraints imposed in a unionized labor market would conflict with the collective bargaining process established by the labor laws. This Court recognized the clear potential for such a conflict in its early labor exemption decisions when it concluded that, even with respect to restraints in a *product* market, the antitrust policy favoring free competition in business markets must occasionally give way to the labor law policy favoring collective bargaining in accordance with the NLRA. *See Local Union 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965); *id.* at 711-12 (opinion of Goldberg, J.) ("To tell the parties that they must bargain about a point but may be subject to antitrust penalties if they reach an agreement is to stultify the congressional scheme."). As both the majority and the dissent below confirmed, "[c]ourts presume that Congress implicitly intended to exempt from antitrust scrutiny those concerted activities

explicitly authorized by labor laws that are essential to collective bargaining[,]" as well as other longstanding labor activities not expressly authorized by the NLRA, such as multiemployer bargaining. Pet. App. 43a, 53a n.7 (Wald, J., dissenting).

Although petitioners apparently perceive some rhetorical advantage in framing the issue in terms of an "implied repeal," they too acknowledge that conflict is the governing test: "the [labor] exemption is justified only to the extent that 'labor policy requires,' and only when application of the antitrust laws affirmatively 'conflicts with' the NLRA's collective bargaining scheme." Pet. Br. at 17 (citing *Connell Constr. Co. v. Plumbers & Steamfitters, Local No. 100*, 421 U.S. 616, 622 (1975), and *United Mine Workers v. Pennington*, 381 U.S. 657, 666 (1965)). The government also agrees that where "there is a conflict between the labor laws and the antitrust laws such that both cannot be given full effect, . . . the antitrust laws should yield to the more specific, and later enacted, obligations of the NLRA." U.S. Br. at 16. As the Second Circuit has cogently summarized, "no one seriously contends that the antitrust laws may be used to subvert fundamental principles of our federal labor policy as set out in the National Labor Relations Act." *Wood v. National Basketball Ass'n*, 809 F.2d 954, 959 (2d Cir. 1987).

B. Application Of The Antitrust Laws At Expiration Of The Collective Bargaining Agreement Would Conflict With The Labor Laws.

Petitioners' initial position is that the antitrust laws should attach immediately upon expiration of a collective bargaining agreement for any term or condition of employment maintained in effect by the multiemployer unit. Pet. Br. at 45. This extreme argument, which finds support only in the district court's decision below, Pet. App. 72a-80a, has been rejected not only by the govern-

ment in this very case, U.S. Br. at 16, but also by every other court to address the issue.[3]

The reason is plain: under the *Katz* doctrine established by the NLRB and endorsed by this Court, employers are *required* to maintain in effect previously-bargained terms of employment following the expiration of a collective agreement, at least until the parties reach a bargaining impasse. *See NLRB v. Katz*, 369 U.S. 736, 743-43 (1962); *accord Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); Pet. App. 22a n.7. "'Freezing the status quo ante after a collective agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract.'" *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 545 n.6 (1988) (quoting opinion below). A contrary rule would destabilize the process and polarize the parties. As the district court in *Williams* stated, "[o]ne can easily imagine the howls to be heard from the Players if the Teams unilaterally terminated medical coverage for them and their families at the formal expiration of the Collective Bargaining Agreement." *Williams*, 857 F. Supp. at 1074. In short, conduct that is required by the federal labor laws cannot violate the antitrust laws.

Underlying petitioners' thoroughly-discredited argument that the antitrust laws attach at expiration (as well as their subsequent argument that the antitrust laws attach at impasse) is the theory that employee consent forms the basis for the labor exemption. But that theory is demonstrably false. As established in detail in the NFL's brief, the labor exemption does not exist to "protect employees," as petitioners contend (Pet. Br. at 18), or to protect employers; rather, it arises out of, and is designed to protect, the comprehensive and evenhanded framework for resolving collective bargaining disputes established by Congress in the federal labor

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[3] *See Williams*, 45 F.3d at 691; *Williams*, 857 F. Supp. at 1078; *Powell*, 930 F.2d at 1303; *Powell v. National Football League*, 678 F. Supp. 777, 778 (D. Minn. 1988); *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 966 (D.N.J. 1987).

laws. *See* U.S. Br. at 14 (the labor exemption is "firmly grounded in the requirements of another statutory enactment, the NLRA"). It would be a bizarre result, indeed, if this carefully-crafted scheme for resolving labor disputes were to be free from antitrust interference only when a union does *not* dispute the prevailing terms and conditions of employment.

For this reason, petitioners' contention that a union can unilaterally waive an employer's *status quo* obligation has no legal basis. *See* Pet. Br. at 47. The *Katz* doctrine, like the parties' mutual obligation to bargain in good faith, is imposed by the labor laws in order to foster the *process* of collective bargaining, not the achievement of any one side's bargaining demands.[4]

Nor is petitioners' broad "consent" theory supported by *Litton Fin. Printing Div., supra*. *See* Pet. Br. at 46. Although the Court in that case did hold that a narrow group of employment terms -- in particular, arbitration, dues check-off, and no-strike clauses -- do not survive expiration of a collective agreement, it expressly reaffirmed that "most mandatory subjects of bargaining are within the *Katz* prohibition on unilateral changes." 501 U.S. at 199. Thus, petitioners' argument -- which essentially reduces to the proposition that *Litton* overruled *Katz* -- is clearly wrong.

Petitioners themselves deliver the final blow to their "consent" theory when they concede that the antitrust laws do not apply to a lockout or the hiring of replacement workers. *See* Pet. Br. at 40. Such employer conduct, of course, occurs *without* union consent and, indeed, over a union's adamant objections. Neverthe-

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[4] Petitioners' sole cited authority for the proposition that a union can waive the *status quo* obligation -- *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224-25 (1949) -- actually undercuts their argument. There, in affirming the NLRB's finding of an unfair labor practice, the Court confirmed that any changes in the *status quo* can only occur after *both* sides have discharged their *mutual* obligation to bargain in good faith to impasse. *Id.*

less, as petitioners, the dissent below, and numerous courts have acknowledged, lockouts and similar employer conduct are expressly authorized by the federal labor laws and are therefore not within the purview of the antitrust laws. Pet. App. 53a n.7 (citing cases). In the face of this concession, petitioners' "consent" argument can hardly be taken seriously.

C. Application Of The Antitrust Laws At Impasse Would Conflict With The Labor Laws.

Petitioners advance the alternative argument that the antitrust laws should attach no later than when the parties have reached the first impasse in negotiations. This contention fails at the outset for the reason discussed above: namely, that the labor exemption does not arise from union consent, but rather from the congressional policy favoring collective bargaining as the exclusive method for resolving labor disputes.

Petitioners' argument also presumes that impasse signals the end of the collective bargaining process and the governing authority of the labor laws. But in *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404 (1982), this Court clearly rejected that notion:

> As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations "which in almost all cases is eventually broken, through either a change of mind or the application of economic force." Furthermore, an impasse may be "brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process." Hence, "there is little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways."

Id. at 412 (quoting *Bonanno Linen*, 243 N.L.R.B. 1093, 1093-94 (1979); citations omitted); *accord, e.g., Hi-Way Billboards, Inc.*, 206

N.L.R.B. 22, 23 (1973) (impasse "is merely a momentary eddy in the flow of collective bargaining"), *enforcement denied on other grounds*, 500 F.2d 181 (5th Cir. 1974).

The labor laws and the collective bargaining process remain in full force and effect after impasse. Most importantly, the existence of an impasse does not permanently relieve either party of its statutory duty to bargain in good faith; to the contrary, that duty is only temporarily suspended at impasse, and is reactivated by "any changed condition or circumstance" -- such as a strike, lockout, change of mind, or change of economic fortune. I Patrick Hardin, *The Developing Labor Law* 697 (3d ed. 1992); *accord, e.g.*, *Retlaw Broadcasting Co.*, 1994 NLRB LEXIS 1074, *17-18 (Dec. 30, 1994) ("The bargaining process, itself, contemplates that passage of time following [an impasse] will lead one or the other party to modify its position(s) on deadlock issues, and, once that occurs, all parties are obliged to resume negotiations in a renewed effort to reach agreement on terms for a collective-bargaining contract."); *Hi-Way Billboards, Inc.*, 206 N.L.R.B. at 23 (the use of "economic pressure" usually breaks a bargaining impasse and "revives the parties' duty to bargain").

Further, the existence of an impasse does not affect either side's labor law duty to disclose relevant information. *Retlaw Broadcasting Co.*, 1994 NLRB LEXIS 1074 at *18 (citing, *e.g.*, *Whitin Machine Works*, 108 N.L.R.B. 1537, 1541, *enf'd*, 217 F.2d 593 (4th Cir. 1954), *cert. denied*, 349 U.S. 905 (1955)). Nor does an impasse allow an employer to withdraw from a multiemployer unit, *Bonanno Linen*, 454 U.S. at 412-13, or take action amounting to a withdrawal of recognition of the union's representative status, *see, e.g.*, *Newspaper Printing Corp. v. NLRB*, 625 F.2d 956, 964-65 (10th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981). Finally, although the labor laws allow an employer to implement new employment terms at impasse, that right comes with an important limitation: namely, that the employer may only implement such terms as are reasonably contemplated within its pre-impasse bargaining proposals. *See Laborers Health & Welfare Trust Fund*, 484 U.S. at 543 n.5; *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965). In short, there is simply no basis for treating impasse as

anything other than a lawful intermediate stage of the collective bargaining process that will eventually give way to a resolution of the parties' labor dispute.[5]

Application of the antitrust laws at impasse would also provide powerful incentives for employees to manufacture a stalemate in negotiations, in derogation of their obligation to bargain in good faith. The existence of such incentives was one reason that the Court in *Bonanno Linen* rejected the argument that the existence of an impasse warranted an employer's withdrawal from a multi-employer bargaining unit. *See Bonanno Linen*, 454 U.S. at 412 n.8 (accepting the NLRB's explanation that if withdrawal were allowed at impasse, "parties could precipitate an impasse in order to escape any agreement less favorable than the one expected").

This is no theoretical concern. On June 15, 1994, the NBPA notified the NBA that, in the Union's view, the parties had reached a bargaining "impasse" in their efforts to negotiate a successor to the 1988 Collective Bargaining Agreement. Such an impasse existed, asserted the Union, notwithstanding the facts that (i) the parties had by then held only *two* bargaining sessions (totaling five hours of negotiations) toward a new agreement, (ii) the parties had addressed only a few of the numerous open issues between them, and (iii) the 1988 Agreement was not even set to expire until June 23, 1994. By adopting the position that negotiations had broken down, the Union was clearly attempting to put itself in a position to assert -- under either *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 967 (D.N.J. 1987) (erroneously holding that the labor exemption terminates when the employer no longer has a "reasonable belief" that the challenged practice will be agreed

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[5] The dissent below seems clearly to have missed this point. *See* Pet. App. 34a, 52a, 60a (describing impasse variously as the point when "bargaining has irretrievably stalled," when the employer "has been relieved of his statutory duty to bargain" and "when an agreement is no longer in sight or even being sought"). This fundamental error underlies the dissent's determination that the antitrust laws should attach at impasse. *Id.* at 52a.

upon by the union) or the district court's decision below, Pet. App. 80a (erroneously adopting impasse as an alternative standard) -- that various employment terms contained in the 1988 Agreement would now "'be subject to successful challenge under the antitrust laws.'" *Williams*, 857 F. Supp. at 1072 (quoting NBPA position paper delivered on April 7, 1994). Because an impasse standard would encourage unions to pursue antitrust litigation, rather than collective bargaining, it would conflict with the labor law process established in the NLRA.[6]

An impasse standard would also be completely unworkable. As petitioners concede, a determination of impasse is a complex factual inquiry often enveloped in "uncertainty and legal limbo." Pet. Br. at 45; *see Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967) (enumerating factors in evaluating impasse), *enf'd sub nom. American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (1968). Neither the collective bargaining process, nor the antitrust laws, would be served by a test that requires the parties to guess precisely when the legal landscape will fundamentally change. These same infirmities are present in the government's proposed standard, under which the antitrust laws would begin to apply after the employer has been advised by counsel that a bargaining impasse exists and afforded sufficient time to "eliminate any previously immunized restraint." U.S. Br. at 24. Given the transitory and ephemeral nature of a bargaining impasse, counsel is in no better position than management to identify the precise point at which this event occurs and treble damage liability may begin to accrue. The government's impasse standard would also raise substantial problems of proof, including serious issues of attorney-client privilege.

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[6] The union representing NFL players engaged in a similar stratagem when it announced an impasse in negotiations with the NFL only one business day after the district court in *Powell* erroneously held that the antitrust laws attach at impasse. *See Powell*, 930 F.2d at 1296.

At bottom, there is no consistent rationale underlying an impasse standard. Petitioners acknowledge as much when they concede that certain post-impasse conduct authorized by the labor laws -- such as a lockout or the hiring of replacement workers -- would still remain subject to the labor exemption. Pet. Br. at 40. Thus, for an employer like the NBA that simply maintains the *status quo*, the same conduct that was legal on one day could become instantly illegal the next. Indeed, because "[i]t is possible, in fact, that impasse could occur more than once within the course of a single labor dispute," U.S. Br. at 24, an employer's post-impasse maintenance of a wage scale, for example, could (under petitioners' theory) become potentially illegal, then legal, then potentially illegal again. Such a result would not only conflict with the congressional policy favoring collective bargaining, it would simply make no sense.[7]

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[7] Nor is the impasse standard rendered any more coherent by the unsupported distinction between bargaining "terms" and "tactics" suggested by the dissent below. Pet. App. 50a. If an employer is satisfied with the *status quo* -- for example, a wage scale that has not kept up with the cost of living -- its post-impasse decision to maintain that employment term in effect could equally well be a "tool[] to put pressure on the other bargaining party to reach agreement" (the dissent's definition of an immunized bargaining "tactic") or "simply the way the employer decides to run his business in the absence of any bargaining agreement" (the dissent's definition of a non-immunized bargaining "term") -- or both. *Id.* at 54a. The same is true of the employer's decision to implement a minimal wage increase that it had proposed prior to impasse. Nevertheless, the dissent concluded that an employer "can maintain the status quo" after impasse without fear of antitrust attack, but cannot similarly implement new employment terms. Pet. App. 58a. Again, such a standard simply makes no sense. *See also* NFL Brief (demonstrating that post-impasse implementation is fully authorized by the labor laws and, in any case, clearly considered to be an economic pressure tactic).

D. Application of the Antitrust Laws To Labor Market Restraints Would Conflict With Multiemployer Bargaining, Particularly Multiemployer Bargaining In Professional Sports

There is "no doubt whatsoever," as the opinion below makes clear, that petitioners' antitrust claim would fail if asserted against a single employer. Pet. App. 25a. Petitioners did not contest the point below, *id.*, and neither they nor their *amici* do so here. Thus, "the heart of the Players' position appears to be that the presence of a multiemployer bargaining unit should make a difference under the antitrust law." *Id.* It clearly does not. As this Court's decisions reflect, *see NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 94-96 (1957) ("*Buffalo Linen*"); *Bonanno Linen*, 454 U.S. at 409-10, nn.3-4, and the majority concluded below, Pet. App. 25a-29a (quoting from the Second Circuit's opinion in *Williams*), Congress did not intend that multiemployer bargaining units be afforded any fewer rights under the labor laws than those available to a single employer. There is simply no basis for petitioner's contrary conclusion.[8]

The conflict between petitioners' antitrust claims and multiemployer bargaining is especially acute in the professional sports industry, where multiemployer bargaining is compulsory in nature. As the Second Circuit held in *Williams*, "sports leagues are an exception to the principle of voluntariness" that typically underlies multiemployer bargaining. 45 F.3d at 692. A professional sports league like the NBA, for example, must be able to ensure through collective bargaining that its teams play the same number

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[8] We do not detail here the numerous and substantial benefits afforded to both management and labor by the process of multi-employer bargaining. These benefits are discussed at length in both the Court's prior opinions and the opinion below (cited in text), and further elaborated in other *amicus* filings made on behalf of the NFL.

of regular season games; it must equally be able to prohibit varying agreements between individual teams and their player-employees concerning when those games will be played (*e.g.*, an agreement that games will not be played at night) or where they will be played (*e.g.*, an agreement that games will only be played in warm weather cities). Further, because the NBA's product is athletic competition, it is essential that the League and its players agree on uniform employment terms -- such as the size of team rosters, the NBA Draft, the Salary Cap, and free agency rules -- designed to equalize each team's ability to compete through the acquisition and retention of player talent. Varying agreements between individual teams and their player-employees on these and similar matters would destroy the NBA's ability to produce its integrated and competitively balanced entertainment product.[9]

Petitioners' argument is therefore not supported by the assertion that, after expiration of a collective agreement or at impasse, individual member teams of a professional sports league could avoid multiemployer bargaining and independently negotiate interim agreements with their player-employees. Pet. Br. at 40. Indeed, the Fifth Circuit concluded that the member teams of a professional soccer league were a "joint employer" and therefore *required* to engage in collective bargaining as a unit. *See North Am. Soccer League v. NLRB*, 613 F.2d 1379, 1383 (5th Cir.), *cert.*

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[9] That the members of a professional sports league must act cooperatively in order to have any product to sell has been confirmed by this and other courts. *See, e.g., NCAA v. Board of Regents*, 468 U.S. 85, 101 (1984) ("league sports" is "[p]erhaps the leading example" of a business activity that "can only be carried out jointly"); *Reynolds v. National Football League*, 584 F.2d 280, 287 (8th Cir. 1978) ("Some leveling and balancing rules appear necessary to keep the various teams on a competitive basis, without which public interest in any sport quickly fades."); *Chicago Prof. Sports Ltd. Partnership v. NBA*, 874 F. Supp. 844, 849 (N.D. Ill. 1995) ("Mutual agreement is *necessary* to create the 'product' of competitive basketball games and to insure its quality.") (emphasis added).

denied, 449 U.S. 899 (1980). The NLRB reached a similar conclusion with respect to the NFL, finding that its teams "constitute a single employer for bargaining purposes." *National Football League Management Council*, 203 N.L.R.B. 958, 961 (1973), *rev'd on other grounds, National Football League Players Ass'n v. NLRB*, 503 F.2d 12 (8th Cir. 1974). Thus, petitioners' antitrust claims simply cannot be squared with the manner in which the collective bargaining process has operated and must operate in professional sports.[10]

II. THIS CASE AND OTHER PLAYER ANTITRUST LITIGATION SERVES NO UNDERLYING ANTITRUST INTEREST, BUT IS SIMPLY INTENDED TO INCREASE THE PLAYERS' LEVERAGE IN COLLECTIVE BARGAINING

Petitioners contend that their antitrust attack on the NFL's wage scale promotes the goals of the Sherman Act by "preserving" for unionized professional athletes an "antitrust right" to negotiate their salaries on an individual basis. Pet. Br. at 23-27. No such right exists. As the NFL demonstrates in its brief, the antitrust laws were not intended to address restraints operating solely in a labor market, particularly those produced in collective bargaining between a union and a multiemployer bargaining unit.

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[10] The fact that all NBA teams *must* bargain collectively also supports the view that the League is a single economic enterprise incapable of conspiring under Section 1 of the Sherman Act. *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (rejecting intra-enterprise conspiracy doctrine); *National Football League v. North Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of *certiorari*) (the NFL is not "offering the individual goods of many sellers, but is a separate seller offering its [product]"). We recognize that the single enterprise issue (which would provide a complete defense to the antitrust claims asserted in this case) has not been presented here and thus is not appropriate for the Court to address in this case.

Moreover, the NLRA makes clear that unionized employees may negotiate their wages only on terms established through *collective bargaining*. *See* 29 U.S.C. § 158(d) (collective bargaining over wages is "the mutual obligation of the employer and the representative of the employees"); § 159(a) ("wages" are a mandatory subject of collective bargaining). This Court has so confirmed on at least two occasions, holding that the NLRA "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *accord J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944). Unionized professional athletes are allowed to negotiate their own salaries *only* in those instances where the union *and* the employer have so agreed as part of a *collective* bargaining agreement. Thus, for example, the collective agreement between the NBA and the NBPA provides that "notwithstanding" the NBPA's status as the exclusive bargaining representative of all NBA players, such players "may, on an individual basis, bargain with respect to and agree upon Player contracts, but only as and to the extent permitted by this Agreement." In short, the "individual bargaining" that petitioners seek in this lawsuit is "not an exercise of a right to free competition under the antitrust laws; rather, it is an exercise of a right derived from collective bargaining itself." *Caldwell v. American Basketball Ass'n*, 66 F.3d 523, 528 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3439 (U.S. Dec. 20, 1995) (No. 95-1012).

Antitrust litigation of the kind pursued by professional athletes does not and cannot vindicate any policy underlying the Sherman Act. To the contrary, the labor disputes at the heart of such cases can only be resolved pursuant to the collective bargaining process. Thus, for example, the players' antitrust attack on the NBA Draft, Revenue Sharing/Salary Cap System, and Right of First Refusal in *Williams* was eventually resolved by the parties' agreement to a new 1995 Collective Bargaining Agreement (containing a modified version of all three employment "restraints"). The same result occurred in 1987, when the NBPA represented to the district court in *Bridgeman* that it would "never again agree" to the NBA

Draft, Salary Cap, and Right of First Refusal, but then eventually agreed to modified versions of these very employment terms in the 1988 Collective Bargaining Agreement. *See Williams*, 857 F. Supp. at 1072 (recounting collective bargaining history). Indeed, even if a mandatory subject of collective bargaining (such as a wage scale) were condemned by a court as an illegal "restraint of trade," the parties would still be obligated under the labor laws to engage in good faith negotiations about that term and, as the government recognizes, U.S. Br. at 22, could eventually agree to include it in their next collective bargaining agreement. In this case, for example, the salaries to be paid to members of Developmental Squads are now determined in accordance with the 1993 NFL-NFLPA Collective Bargaining Agreement.

The sole purpose of player antitrust litigation is to create leverage at the bargaining table. As the NBPA candidly acknowledged in its brief to the Second Circuit in *Williams*:

> [R]egardless of the outcome of litigation, some collective bargain will eventually be reached; no one believes that either the owners or the player will permanently choose to forego their mutually dependent business opportunities. Thus, allowing employees to pursue their Sherman Act claims will likely alter the substance of the collective bargain . . . .

NBPA Br. in *Williams*, at 27-28; *accord* U.S. Br. at 22. This fact puts the lie to petitioners' antitrust theory: the quest for additional leverage at the bargaining table simply cannot be squared with the congressional policy favoring "free competition in business markets" underlying the antitrust laws.

III. THE NBA'S EXPERIENCE IN COLLECTIVE BARGAINING ESTABLISHES THAT THE EXISTENCE OF PLAYER ANTITRUST LITIGATION, NOT ITS ABSENCE, UNDERMINES THE LABOR LAW PROCESS

Petitioners and their *amici* argue that player antitrust litigation has had a salutary effect on the collective bargaining process in professional sports, and that the exclusion of such lawsuits will lead to increased "disruption" and "dislocation" in labor-management relations in the future. Pet. Br. at 43-44; PA Br. at 4-18. That contention is utterly meritless.

First, the conduct about which petitioners complain -- strikes, lockouts, and other uses of economic force -- is both permitted and regulated by the federal labor laws. *See, e.g.*, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962) (union's right to strike); *American Ship Building Co.*, 380 U.S. at 310-11 (employer's right to lock out or to implement new employment terms at impasse). As this Court has confirmed, "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477, 489 (1960); *accord First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 678 (1981) (noting Congress' "belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole"). If petitioners are dissatisfied with the rights and remedies made available to labor and management in the collective bargaining process, their arguments should be made to Congress and not to federal antitrust courts.

Second, an accurate recitation of the history of collective bargaining in professional sports demonstrates that it is the presence, not the absence, of antitrust litigation that has disrupted the parties' efforts to resolve their disputes -- as they eventually must -- in accordance with the labor laws. In the latest round of collective bargaining in the NBA, for example, serious negotiations

toward a multi-year agreement to succeed the parties' 1988 Collective Bargaining Agreement did not take place until December 7, 1994 -- more than five months after the 1988 Agreement expired on June 23, 1994, and fully eight months after the parties held their first formal bargaining session on April 7, 1994. Rather than engaging in collective bargaining during this period, the parties' efforts were solely devoted toward antitrust threats and litigation. In particular:

1. In April and May of 1994, the players threatened to sue the League if it merely continued in effect the NBA Draft, Salary Cap, and Right of First Refusal after the expiration of the 1988 Agreement. *See Williams*, 857 F. Supp. at 1072.

2. In a June 15, 1994 letter, the NBPA predictably announced that the parties were at impasse, notwithstanding the fact that they had held only five hours of talks in two formal bargaining sessions. *See id.* at 1072-73.

3. On June 17, 1994, and in order to protect itself against the NBPA's antitrust threats, the NBA commenced the *Williams* action; ten days later, the NBPA and its members counterclaimed for injunctive relief and treble damages.

4. Over the next three weeks, the parties were involved in intense litigation: first, the players' request for a temporary restraining order prohibiting the signing of any further NBA player contracts (granted on June 28, 1994); then the players' motion for a preliminary injunction (heard and deferred on July 8, 1994); and finally an expedited trial on the merits (held July 12, 1994). *See Williams*, 45 F.3d at 686.

5. On July 18, 1994, the district court issued its decision in favor of the NBA. *Id.* Immediately

> thereafter, the NBA invited the NBPA to resume collective bargaining. The Union refused, stating in an August 3, 1994 memorandum to its members that "we do not expect to have any bargaining sessions with the League until the [Second Circuit] decides our appeal."
>
> 6. In late October 1994, with the scheduled start of the 1994-95 NBA season only weeks away, the NBPA agreed to discuss -- and the parties eventually entered into -- a one-year extension (with some modifications) of their 1988 Agreement. As a result of these discussions, the parties commenced bargaining toward a new multi-year agreement on December 7, 1994.

This was not the first time that efforts to negotiate a new NBA-NBPA collective bargaining agreement had been sidetracked by antitrust litigation. In 1987, serious negotiations toward a new agreement commenced only after a district court rejected the NBPA's claim that the League's maintenance of the *status quo* was subject to antitrust scrutiny. *See Bridgeman*, 675 F. Supp. at 967. As early as 1976, and again in 1982, the Union initially refused to bargain over certain disputed employment terms on the ground that they were antitrust violations.[11]

In each of these instances, the players' antitrust claims served only to distract the parties, poison their relationship, and delay the inevitable commencement of full-scale bargaining toward a new collective agreement. These and similar player lawsuits have

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[11] Following the 1976 incident, the NLRB issued an Advice Memorandum concluding that each of the matters about which the NBA sought to negotiate (including, for example, the NBA Draft) was a mandatory subject of collective bargaining and that the NBPA's refusal to bargain over them would constitute an unfair labor practice. *National Basketball Players Ass'n*, 4 Adv. Mem. Rep. ¶ 10,037 (Jan. 26, 1976).

also had the effect of draining scarce judicial resources, a particularly unfortunate result in light of Congress' clear contemplation "that neither the courts nor the National Labor Relations Board would intervene on a case-by-case basis to adjust the parties' relative bargaining power, but rather [would] leave them to fight it out at the bargaining table." Pet. App. 46a (Wald, J., dissenting).

Finally, petitioners' predictions as to the "disruptive" effect of the decision below are equally erroneous. Labor-management relations in the NBA again prove the point. By June 14, 1995, the date on which the parties' one-year extension of the 1988 Collective Bargaining Agreement was set to expire, both the Second Circuit in *Williams* and the D.C. Circuit in this case had issued their decisions. Thus, on or after that date, the NBA could have manufactured a bargaining "impasse" (as the dissent suggested would occur, Pet. App. 47a n.6) and implemented new employment terms without fear of antitrust liability. But rather than following this course, the NBA agreed upon a brief extension of the parties' one-year agreement in order to facilitate further negotiations. As a result of this extension and virtually round-the-clock negotiations, representatives of the NBA and the NBPA were able to reach a new six-year collective bargaining agreement on June 21, 1995. The next day, the membership of the NBPA refused to ratify the pact, an act that (under the circumstances) clearly signaled a bargaining impasse. Again, however, the NBA did not implement the provisions of the June 21 agreement, but instead commenced a lockout of NBA players on July 1. This action -- which petitioners concede is outside the scope of the antitrust laws, Pet. Br. at 40 -- had the effect of shutting down the NBA's business and thus putting pressure on both sides to reach a new deal. After several further concessions by the NBA, an agreement was reached on August 8, 1995 and subsequently ratified.

It is therefore clear that the decision below will not "destabilize" labor-management relations or provide management with "additional" economic weapons. To the contrary, that decision simply leaves the parties where they were before, with the full range of rights and remedies made available to them by the federal labor laws. This collective bargaining process, and not anti-

trust litigation, is what Congress intended for the resolution of labor-management disputes when it passed the NLRA.

CONCLUSION

For the foregoing reasons, as well as those set forth in respondent NFL's brief, the judgment of the Court of Appeals should be affirmed.

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PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN SUPPORT OF RESPONDENTS

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Michael J. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 Yale L.J. 1 (1971) 20
Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 Geo. L.J. 19 (1986) 18
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BRIEF AMICUS CURIAE FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICUS CURIAE

The Associated General Contractors of America, Inc. ("AGC") is a private, nonprofit trade association founded in 1918 to represent the national interests of general construction contractors and other firms associated with the construction industry.[1] AGC has 101 state and local chapters, with at least one chapter serving the general contractors and related firms in each state, and one chapter in Puerto Rico. AGC's members range from small, family-owned businesses to the largest contractors in the country. Collectively, AGC members perform the major-

[1] This brief is filed with the consent of the parties. Copies of the consent letters have been filed with the Clerk.

ity of the construction of public, commercial, and residential buildings, highways, bridges, industrial and defense facilities, and municipal utilities in the United States.

This case concerns whether and, if so, how the antitrust laws apply to multi-employer groups exercising their collective bargaining rights under the Nation's labor laws. Although the resolution of that question will have profound implications throughout the economy, the Court has chosen to examine the issue in the narrow and atypical context of professional sports. Neither petitioners nor the amici outside the arena of professional sports that have chosen to appear to support them are representative of the numerous segments of the economy that will be affected by this Court's decision. *See, e.g.*, Brief of Amici Curiae the Screen Actors Guild, Inc., *et al.* in Support of Petitioners ("Br. of Amici SAG"). Tellingly, even the brief filed by the Solicitor General was signed only by the Antitrust Division and the Federal Trade Commission in addition to the Solicitor General—not the usual sources within the Federal Government for guidance on important questions directly affecting the Nation's labor laws. *See* Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioners ("Gov't Br.").

The construction industry is more broadly representative of the many unionized segments of the national economy than is either the professional sports or the entertainment businesses. Standing alone, the unionized segment of the construction industry accounts for some $265 billion in annual revenues, or about four percent of the national economy, and exists in every region of the country. Many of AGC's chapters have been and remain the vehicle for multi-employer collective bargaining with construction and building trade unions. AGC has been involved in such multi-employer bargaining for decades.

AGC's assessment of the practical consequences for multi-employer bargaining if the decision below is reversed will provide the Court with a broader perspective on the effect and implications of imposing antitrust liability upon multi-employer bargaining groups than the views provided by petitioners and their supporting amici. AGC is concerned that imposing antitrust liability upon multi-employer bargaining groups for exercising their right to unilaterally implement a good faith bargaining offer at the point of impasse will substantially impair multi-employer bargaining in the construction industry. AGC believes that, faced with the prospect of such liability, many employers will opt to bargain individually. This will destabilize the collective bargaining process. For many decades, multi-employer bargaining has been the starting point for almost all collective bargaining in the construction industry. Destabilizing that foundation would not serve the interests of either employers or unions.

SUMMARY OF ARGUMENT

The question before the Court in this case—whether and, if so, how the antitrust laws apply to multi-employer collective bargaining—transcends the narrow and atypical factual context in which it is presented. If adopted, the sweeping conclusions urged by petitioners and their supporting amici would extend to multi-employer bargaining in all industries, regardless of their economic and competitive structure. This would impair multi-employer bargaining where it has proved most effective in promoting labor peace and stability—in the more typical industries such as construction. This result not only would be detrimental to the thousands of employers and millions of workers nationwide who benefit from multi-employer bargaining arrangements, but also cannot be squared with the congressional policies underlying either the labor or antitrust laws.

In the more typical industries such as construction, there are literally thousands of different multi-employer

bargaining units at the local, state, and regional level. These units consist of anywhere from two to dozens of employers who have banded together to take advantage of the multi-employer collective bargaining process. Most of the bargaining between these multi-employer groups and the unions with which they deal concerns "mandatory subjects" such as wages and benefits. 29 U.S.C. § 158 (d). Employers benefit from multi-employer bargaining by being able to pool their resources and to reach agreements establishing the terms of and assurances for the employment of a usually dispersed and often large workforce.

Unions and their members, on the other hand, benefit from multi-employer bargaining because it enables them to reach area-wide agreements over employment terms and conditions with a large number of employers, thereby reducing the likelihood that particular employers will use labor costs as a competitive weapon in seeking business. In addition, unions are able to secure important benefits—including health insurance, pension plans, and hiring halls —that they would not be able to obtain from many employers on an individual basis. This is particularly important in the construction industry, because it enables the often transient workforce to move from one job (and employer) to another without having to negotiate new wage rates or to sacrifice long-term benefits.

But the benefits of multi-employer bargaining transcend the particular parties and interests involved. As this Court has recognized, history teaches that multi-employer bargaining has been a "vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 95 (1957). Even with the best of intentions, the bargaining process sometimes breaks down. Congress has recognized that both labor and management have a number of potent economic weapons that may be exercised in an effort to break impasse and to secure each side's respective aims.

These weapons are "part and parcel" of the collective bargaining process under the labor laws. *NLRB* v. *Insurance Agents Int'l Union*, 361 U.S. 477, 489 (1960). They include the right of employers to unilaterally impose good faith bargaining proposals after impasse.

Subjecting multi-employer groups to liability under the antitrust laws for exercising these weapons would undermine national labor policy because it would destabilize the collective bargaining process and ultimately deter multi-employer bargaining altogether. The result would be increased labor unrest. At the same time, the national policy underlying the antitrust laws—promotion of business competition—would not be materially advanced. The Clayton Act unambiguously exempts restraints on competition in "human labor" from the Sherman Act's reach. 15 U.S.C. § 17. This Court, moreover, has long recognized that the antitrust laws are aimed at restraints on the *product*—not labor—market. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940). In this case, all agree that the challenged restraint affects only the *labor* market. Traditional antitrust concerns simply are not implicated.

Where, as here, restraints on human labor are concerned, there is no conflict between the Nation's labor and antitrust laws. The Clayton Act resolved that. But, even so, a proper accommodation of the policies underlying the labor and antitrust laws compels the conclusion that multi-employer bargaining groups are immune from antitrust liability for exercising their collective bargaining rights where, as here, the challenged conduct places no restraint on competition in a product market. This result is supported by the application of settled canons of statutory construction and principles of sound judicial decision-making. The antitrust laws were never intended—and should not now be read—to provide a vehicle for federal court intervention into basic labor disputes. Congress has established a different regime for resolving such disputes: effective collective bargaining on an individual- or multi-employer basis with resort as needed to the economic

weapons at each side's disposal and to administrative remedies. The judgment below should be affirmed.

ARGUMENT

I. MULTI-EMPLOYER BARGAINING HAS BEEN CRITICAL TO THE SUCCESS OF COLLECTIVE BARGAINING AND TO LABOR PEACE AND STABILITY IN THE CONSTRUCTION AND OTHER INDUSTRIES.

1. Multi-employer bargaining is an age-old and commonplace practice. *See Charles D. Bonanno Linen Serv., Inc.* v. *NLRB*, 454 U.S. 404, 409-410 & n.4 (1982); Clarence E. Bennett, *Employers' Associations in the United States: A Study of Typical Associations* 21 (1921) (hereinafter, "*Employers' Associations*"). In enacting the Taft-Hartley amendments in 1947, Congress specifically rejected proposals to "limit or outlaw multi-employer bargaining," noting that there was " 'cogent evidence that in many industries multi-employer bargaining * * * was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining.' " *Charles D. Bonanno Linen Serv.*, 454 U.S. at 409 (citing *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 95 (1957) ("*Buffalo Linen*")).

As this Court has recognized, the advantages of multi-employer bargaining are numerous and accrue to the benefit of both labor and management:

> Multiemployer bargaining * * * enables smaller employers to bargain "on an equal basis with a large union" and avoid "the competitive disadvantages resulting from non-uniform contractual terms." * * * At the same time, it facilitates the development of industry-wide, worker benefit programs that employers otherwise might be unable to provide. More generally, multi-employer bargaining encourages both sides to adopt a flexible attitude during negotiations; * * * employers can make concessions "without fear

> that other employers will refuse to make similar concessions to achieve a competitive advantage," and a union can act similarly "without fear that the employees will be dissatisfied at not receiving the same benefits which the union might win from other employers." Finally, by permitting the union and employers to concentrate their bargaining resources on the negotiation of a single contract, multiemployer bargaining enhances the efficiency and effectiveness of the collective bargaining process and thereby reduces industrial strife. [*Charles D. Bonanno Linen Serv.*, 454 U.S. at 409-410 n.3 (citations omitted).]

Today, employers in many typical American industries routinely organize into multi-employer units for the purpose of negotiating local, state, and national labor agreements with the unions representing their employees. *See, e.g., NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981) (mining); *Buffalo Linen*, 353 U.S. 87 (trucking); *Connell Constr. Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975) (construction). In many respects, multi-employer collective bargaining in the construction industry exemplifies the dynamics of such bargaining.

2. The construction industry is comprised of a large number of general contractors and specialty subcontractors operating on the national, state, and local levels. There are approximately 140,000 collective-bargaining contractors nationwide. The large majority of these contractors operate under one or more of the more than 4,200 labor agreements negotiated on a multi-employer basis. Many of these contractors employ a variety of union members from different trades. In the absence of multi-employer groups, these tradesmen would be unable to secure important employment benefits—including pension plans, health insurance plans, and hiring halls—which smaller employers are unable to provide on an individual basis and which tradesmen would forfeit as they changed employment from one contractor to another.

This is of critical importance to the often transient workforce in the construction industry.

Multi-employer bargaining within the construction industry takes place on many different levels. The AGC, through its chapters, bargains on behalf of general contractors on both the state and local levels. There are, however, a multitude of other organizations through which various specialty contractors engage in multi-employer bargaining. The size of these groups ranges from two to dozens of contractors, depending upon the size of the industry and the territory covered. Moreover, bargaining is conducted not only on a trade-by-trade basis within the industry, but competing associations of employers of a particular trade in the same region often negotiate separate collective bargaining agreements with the same trade unions.[2]

Multi-employer bargaining in the construction industry typically centers around the so-called "mandatory subjects," *i.e.*, "wages, hours and other terms and conditions of employment." 29 U.S.C. § 158(d). Absent union consent, employers in the construction industry, like those in all other industries, are prohibited by federal law from attempting to negotiate wage and other mandatory terms with union-represented employees on an individual basis. *Id. See Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678, 683 (1944). It is on these subjects that employees and employers in the construction industry are most eager to reach agreement on a collective basis. As a result, collective bargaining agreements in the construction industry typically establish specific wage rates, benefits, and other conditions of employment, which apply to *all* employees performing the same work.

Multi-employer bargaining has proved vital to the promotion of industrial peace and stability in the con-

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[2] For example, road building and underground contractors might form into separate multi-employer groups and bargain separate agreements with a union of heavy equipment operators.

struction industry. One of the fundamental objectives of the building and construction trade unions is to equalize the terms and conditions of employment among construction contractors so that contractors cannot use the cost of labor as a weapon in competition for business. Multi-employer bargaining is essential to the unions' ability to achieve that end, because it enables unions to negotiate standard, area-wide labor agreements with numerous contractors. This, in turn, permits unions—as well as contractors—to adopt a more flexible approach to collective bargaining, because it enables them to take positions without fearing that they may be compromising their bargaining power vis-à-vis particular parties.

Multi-employer bargaining also offers practical advantages to its participants. There can be literally hundreds of contractors in a particular geographic area. It is extremely costly and time-consuming for construction trade unions to negotiate with contractors individually; the existence of multi-employer bargaining groups obviates that problem.[3] Contractors favor bargaining in multi-employer groups for the same reason. Engaging in multiple negotiations with different construction trade unions on an individual basis simply would be beyond the resources available to many contractors. Thus, contractors, like unions, find it efficient to band together and share the cost of bargaining an agreement that will be applied to all.

3. The economic structure and nature of collective bargaining in the professional sports and entertainment industries differ from this typical pattern in fundamental respects. The professional sports industry is characterized by a relatively small number of employers who band together to negotiate industry-wide labor agreements that

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[3] For these and other reasons, it is not surprising that *none* of the traditional building trade unions has filed a brief supporting petitioners.

establish only the minimum framework of employment terms. There is an inevitability to this multi-employer action—not present in other industries, including construction—because of the need to establish common, industry-wide ground rules for all employers, or teams, so that "league play" may take place. Moreover, unlike virtually all other industries, the employees in the professional sports and entertainment industries have sought and secured through collective bargaining the opportunity to engage in individual bargaining over wage terms, because of the wide disparity in talent among individual employees affecting salaries in those particular industries. Br. of Amici SAG at 4; Pet. Br. at 7.

II. SUBJECTING MULTI-EMPLOYER BARGAINING GROUPS TO ANTITRUST LIABILITY FOR EXERCISING THEIR COLLECTIVE BARGAINING RIGHTS WOULD DESTABILIZE THE COLLECTIVE BARGAINING PROCESS AND UNDERMINE THE NATIONAL LABOR POLICY OF PROMOTING INDUSTRIAL PEACE AND STABILITY.

1. As this Court has recognized, "the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management" is "central" to the advancement of a "fundamental aim" of the national labor laws—"the establishment and maintenance of industrial peace." *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 674 (1981); 29 U.S.C. § 151 ("encourag[ing] the practice and procedure of collective bargaining"). While the ultimate aim of collective bargaining is of course agreement, negotiations often reach "impasse" before that goal is attained. Impasse is, in fact, a "recurring feature in the bargaining process * * * 'which in almost all cases is eventually broken, through either a change of mind *or the application of economic force.*'" *Charles D. Bonanno Linen Serv.*, 454 U.S. at 412 (citation omitted and emphasis added).

Both labor and management have numerous economic weapons at their disposal to break impasse and pursue their respective aims. *First Nat'l Maintenance Corp.*, 452 U.S. at 675. For example, unions may strike, *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 14 (1962), and employers may lock out employees. *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 310-311 (1965). *See Charles D. Bonanno Linen Serv.*, 454 U.S. at 415-416 n.9, 417 n.10. As this Court has recognized, "[t]he use of economic pressure * * * is of itself not at all inconsistent with the duty of bargaining in good faith." *NLRB* v. *Insurance Agents Int'l Union*, 361 U.S. 477, 490-491 (1960). To the contrary, it is "part and parcel" of the collective bargaining process established by the national labor laws. *Id.* at 489.

The right to unilaterally impose terms based on good faith bargaining proposals after impasse is an entirely proper and long-recognized weapon in management's arsenal. *See Laborers Health & Welfare Trust Fund for N. Cal.* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.5 (1988); *Charles D. Bonanno Linen Serv.*, 454 U.S. at 415-416 n.9; *American Ship Bldg. Co.*, 380 U.S. at 308; *NLRB* v. *Katz*, 369 U.S. 736, 744-746 (1962).[4] Of course, as will always be the case in determining whether to exercise the economic weapons at each

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[4] The Courts of Appeals also have recognized the existence of this long-standing collective bargaining right. *See, e.g., Rivera-Vega* v. *Conagra, Inc.*, 70 F.3d 153, 161 (1st Cir. 1995); *NLRB* v. *WPIX, Inc.*, 906 F.2d 898, 900 (2d Cir.), *cert. denied*, 498 U.S. 911 (1990); *Moldovan* v. *Great Atlantic & Pac. Tea Co.*, 790 F.2d 894, 900 (3d Cir. 1986), *cert. denied*, 485 U.S. 904 (1988); *AMF Bowling Co.* v. *NLRB*, 63 F.3d 1293, 1299 (4th Cir. 1995); *United Steelworkers of Am.* v. *Asarco, Inc.*, 970 F.2d 1448, 1452 (5th Cir. 1992); *NLRB* v. *Plainville Ready Mix Concrete Co.*, 44 F.3d 1320, 1325 (6th Cir.), *cert. denied*, 116 S. Ct. 474 (1995); *NLRB* v. *Transport Serv. Co.*, 973 F.2d 562, 567 (7th Cir. 1992); *NLRB* v. *Unbelievable, Inc.*, 71 F.3d 1434, 1440 (9th Cir. 1995); *United Paperworkers Int'l Union* v. *International Paper Co.*, 920 F.2d 852, 857 n.5 (11th Cir. 1991); *Local Union No. 47, Int'l Bhd. of Elec. Workers* v. *NLRB*, 927 F.2d 635, 642 (D.C. Cir. 1991).

side's disposal, the decision to unilaterally impose new terms after impasse must be carefully made with an eye toward its likely effect on the dynamics of the bargaining process. But our labor laws are premised on the belief that "collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole." *First Nat'l Maintenance Corp.*, 452 U.S. at 678 (citations omitted).[5]

Moreover, unilateral imposition following impasse is, of course, not the end of the story. The parties remain under a continuing obligation to bargain in good faith. *See* 29 U.S.C. § 158(d). And, in the more typical industries such as construction, experience teaches that—even after impasse and the exercise of economic weapons at the parties' disposal—a new collective bargaining agreement ultimately will be reached. Denying multi-employer groups their collective bargaining right to unilaterally impose new terms at impasse would undermine, and not facilitate, that process.

2. Subjecting multi-employer bargaining groups to potential antitrust liability for exercising their collective bargaining rights would have a destabilizing effect on the collective bargaining process in the construction industry by tipping the current economic balance dramatically in favor of union employees. This, in turn, would be almost certain to result in less multi-employer collective bargaining, to the detriment of both contractors and trade unions. *See supra* at 8-9.

In the construction industry, as in other typical industries, both management and labor have effective economic weapons at their disposal. The strike, in particular, is a

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[5] As even the government is forced to concede, the national labor laws "focus[] on the bargaining *process*, rather than the result of that process * * *." Gov't Br. at 22 (emphasis added). For this reason, petitioners' argument that antitrust immunity should attach only when a collective bargaining *agreement* is reached is misplaced.

potent weapon for construction trade unions. Contractors operate under tight time constraints in completing their projects, and construction unions generally exercise tight control of the skilled labor they represent. As a result, it is extremely difficult for collective bargaining contractors to continue operations during strikes and, in practice, very few attempt to do so. Construction unions are, of course, cognizant of this leverage and at times apply it to avoid the imposition of undesirable employment terms and conditions.

Multi-employer contractor groups, on the other hand, whose members believe they cannot compete under terms or conditions proposed by unions during the collective bargaining process, may, upon reaching impasse, implement new terms contemplated in their prior good faith bargaining proposals. This, too, can be an effective tool to break impasse. The result, in practice, has been a relatively even balance of economic power. Subjecting multi-employer groups to the prospect of treble damages under the antitrust laws for exercising their collective bargaining rights would fundamentally disrupt that balance.

According to petitioners, upon impasse, each individual member of a multi-employer bargaining group would still be permitted to implement pre-impasse terms without fear of reprisal under the antitrust laws, as long as it did so individually and not collectively. This is scant comfort. At least where employers had bargained collectively on a multi-employer basis and reached consensus on the terms of a particular offer to the union, any post-impasse implementation of that offer by the same employers—on an "individual" basis—would subject the employers to a very real threat of antitrust liability if petitioners prevail here. It is only natural to presume that unions, with that threat at their disposal, will exert it in the bargaining process.

Nor is it realistic to expect, as petitioners also suggest, that in "the more traditional bargaining context"

labor organizations which seek "standardized industry-wide terms" on a multi-employer basis will agree to relieve those employers of any fear of potential antitrust liability for post-impasse implementation. Pet. Br. at 39. Both common sense and human nature suggest that this valuable antitrust "trump card" would *not* be surrendered, or would be surrendered only at a prohibitive cost to employers.

Virtually all segments of American industry that bargain on a multi-employer basis for industry-wide terms are well served by the established ground rules. Indeed, the reason there has been no "significant antitrust challenge to date" in that context, as petitioners put it, *id.*, is that it has long been assumed that the post-impasse implementation rules pertaining to individual bargaining apply with equal force to multi-employer bargaining. If the Court adopts the dichotomy urged by petitioners, the tradition of multi-employer bargaining in American industry will be only of historical interest.

In the process, many of the advantages of multi-employer collective bargaining will be lost or significantly diminished. It will be more difficult for employees to obtain long-term benefits and assurances of employment. The costs to trade unions and contractors in resources and time will be substantially multiplied due to the duplication of effort involved in bargaining on an individual basis. And, in the absence of multi-employer bargaining, there is certain to be an increase in labor unrest, as trade unions resort to pattern bargaining techniques and "whipsaw" strikes in order to obtain uniform contract terms for all construction employers, which heretofore had been obtained through multi-employer bargaining. *See Buffalo Linen*, 353 U.S. at 90 n.7. All of this is in direct conflict with the Nation's long-standing policy of promoting labor peace and stability through effective collective bargaining, including multi-employer collective bargaining. *See id.* at 94-96.

3. Given the factual context in which this particular case arises, petitioners and their supporting amici direct their arguments to atypical concerns—allegedly present in the professional sports and entertainment industries—of employer "cartels" exercising monopsony power to restrain competition in their markets for labor. These conditions do not exist in the construction industry—or, for that matter, in most of American industry—and therefore should not serve as the practical underpinnings for the Court's resolution of the broad question presented in this case.

As discussed, there is an inevitability to the maintenance of multi-employer bargaining groups in professional sports that is not present in the construction industry, in which multi-employer groups historically have formed in response to the exercise of union power. As a result of the inherent need for multi-employer action on an industry-wide basis in the professional sports context, employers may be forced to risk potential antitrust liability by engaging in multi-employer collective bargaining in the event petitioners' position prevails. Employers in the construction industry, on the other hand, are not constrained by these forces and undoubtedly will find the risk of potential antitrust liability unacceptable.

In addition, while Amici SAG discount the effectiveness of the "strike threat" in the entertainment industry, it remains a particularly potent economic weapon in the construction industry today. *See supra* at 12-13. Thus, even accepting petitioners' assertions about the balance of power in the professional sports and entertainment industries, there is no reason to suppose that the dynamics of those idiosyncratic industries are replicated more generally throughout the country, and in fact they are not.[6]

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[6] Even so, petitioners are far from powerless to combat the unilateral imposition of new terms given the traditional economic weapons and other remedies available to them. *See* Pet. Br. at 42. Petitioners retain the same collective bargaining rights that every other group of represented employees has. Thus, in addition to their

In fact, petitioners here have sought application of the antitrust rules to their own, peculiar form of multi-employer collective bargaining because their own union chose to insist upon—and to secure through collective bargaining—the opportunity for its members to negotiate wages on an individual basis. As discussed, however, the negotiation of wages on an individual basis is the exception rather than the rule in multi-employer bargaining, and is confined to the few industries in which there is a widespread disparity in individual talent affecting salaries. *See supra* at 8, 10.

This unique and relatively atypical set of circumstances —affecting only the small fraction of American workers blessed with the talent necessary to compete in professional sports or the attributes necessary to secure employment in the entertainment industry—simply should not provide the driving force for the rule of law that will be announced in this case, which will affect millions of workers nationwide (including those in the construction industry), whose union representatives and employers rou-

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right to withhold their "unique" and "skilled" services, they possess the traditional remedy before the National Labor Relations Board ("NLRB") for the improper implementation of an employer's "final offer"—filing a bad faith bargaining charge under Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5). *See First Nat'l Maintenance Corp.*, 452 U.S. at 674 (discussing the role of the NLRB in resolving collective bargaining disputes). As evidenced by the recent baseball strike, that remedy can be a powerful weapon against multi-employer bargaining groups that elect to implement good faith bargaining proposals post-impasse. In this case, petitioners never even sought to invoke that remedy. *See* Pet. Br. at 10-11.

Moreover, union members also have a cause of action against their collective bargaining representative for breach of the duty of fair representation. *See Air Line Pilots Ass'n* v. *O'Neill*, 499 U.S. 65, 74 (1991); *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967). Among other things, that duty requires a collective bargaining representative "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion * * * with complete good faith and honesty, and to avoid arbitrary conduct." *Air Line Pilots Ass'n*, 499 U.S. at 76.

tinely bargain over *all* mandatory terms and conditions of employment on a multi-employer basis, and who have been well-served by the current dynamics of the multi-employer collective bargaining process.

III. SUBJECTING MULTI-EMPLOYER GROUPS TO ANTITRUST LIABILITY FOR EXERCISING THEIR COLLECTIVE BARGAINING RIGHTS WOULD NOT MATERIALLY ADVANCE THE NATIONAL ANTITRUST POLICY OF PROMOTING BUSINESS COMPETITION IN PRODUCT MARKETS.

1. The Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Given the breadth of its textual reach, there was immediate confusion following the passage of the Act concerning its application to certain organized labor activities. Courts soon entered the fray and "enjoined strikes as unlawful restraints of trade when a union's conduct or objectives were deemed 'socially or economically harmful.'" *H.A. Artists & Assocs.* v. *Actors' Equity Ass'n*, 451 U.S. 704, 713 (1981) (citation omitted). Congress responded in 1914 with the Clayton Act. *Id. See United States* v. *Hutcheson*, 312 U.S. 219, 229-230 (1941). Section 6 of that Act unequivocally declares that: "The labor of a human being is not a commodity or article of commerce." 15 U.S.C. § 17.[7]

Under a plain reading of Section 6, organized practices that restrain only the *labor* market, including those alleged by petitioners here, cannot amount to a "restraint of trade

[7] Section 6 further immunizes unions and their members from antitrust liability for "lawfully carrying out" their "legitimate object[ives]." 15 U.S.C. § 17. Section 20 of the Clayton Act sought to address the problem of federal court intervention into labor disputes by prohibiting federal court injunctions of "dispute[s] concerning terms or conditions of employment," except in limited circumstances. *See* 29 U.S.C. § 52, discussed *infra* at 23.

or commerce" within the Sherman Act. *Cf. Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 724 (1965) (Goldberg, J.) ("if one thing is clear, it is that Congress has repudiated the view that labor is a commodity" within the meaning of the antitrust laws); *Kennedy* v. *Long Island R.R.*, 319 F.2d 366, 373 (2d Cir.) (summarily rejecting argument that multi-employer bargaining unit was subject to antitrust liability for restraint on labor market based on plain reading of Section 6), *cert. denied*, 375 U.S. 830 (1963). Under settled canons of statutory construction, that plain meaning must be given effect. *See Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992).[8]

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[8] The government urges the Court to disregard the clear import of Section 6's first sentence, because the next sentence is "aimed at *employees'* organizations such as unions, and the legislative history of the Clayton Act gives no indication that Congress intended to immunize *employers'* unilateral * * * combinations in restraint of labor markets." Gov't Br. at 12 n.4 (emphasis in original). But there is absolutely no basis—in the legislative history or elsewhere—for concluding that giving effect to the plain meaning of Section 6 would *contravene* Congress' intent in enacting the Clayton Act. *See* Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 Geo. L.J. 19, 34-58 (1986). Either Congress simply did not foresee that employees would argue that *employers* should be treated differently under the antitrust laws, or Congress presumed that it had resolved that issue by unambiguously exempting restraints in "human labor" from the Sherman Act altogether. Neither result would provide any basis for disregarding the plain meaning of Section 6's first sentence. *See Union Bank* v. *Wolas*, 502 U.S. 151, 158 (1991) ("The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning") (citing *Toibb* v. *Radloff*, 501 U.S. 157, 164 (1991)). Moreover, if Congress had intended to exempt organized employee conduct only, as the government submits, passage of Section 6's second sentence —alone—would have sufficed.

The government also erroneously suggests that a plain reading of Section 6 cannot be squared with prior decisions of this Court. Gov't Br. at 12 n.4. This Court has never directly addressed the argument

Thus, Section 6 of the Clayton Act should foreclose the argument that multi-employer groups may be subjected to antitrust liability for alleged restraints affecting only the labor market. Simply put, restraints on the *labor* market are not restraints on *commerce* within the reach of the Sherman Act. At a minimum, Section 6 evinces a clear congressional intent that the policy motivating the Nation's antitrust laws is not squarely implicated in the case of concerted restraints on labor.

2. This Court, too, has long recognized that restraints on the labor market do not implicate traditional antitrust concerns. The seminal case is *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940). There, the Court held that the Sherman Act prohibits only restraints affecting "commercial competition in the marketing of goods or services," 310 U.S. at 495—*i.e.*, the product market—and that unions are not subject to antitrust liability when they seek merely to further their own interests via the labor market. *Id.* at 499, 500-501. *Accord, H.A. Artists & Assocs.*, 451 U.S. at 715 n.16. The Court's subsequent decisions have faithfully applied *Apex Hosiery*'s product market/labor market distinction in determining whether challenged restraints arising in the labor context implicate antitrust concerns.[9] In this case, all agree that the chal-

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presented here. Nevertheless, as discussed below, the Court's prior precedents support, rather than conflict with, a plain reading of Section 6 because they recognize a product market/labor market distinction in determining whether challenged restraints are subject to the Sherman Act's reach. The challenged restraint in *Radovich* v. *National Football League*, 352 U.S. 445, 448-449 (1957) —an alleged conspiracy to monopolize professional football and destroy a competitive league—had significant potential adverse effects on the product market, and therefore did not fit squarely into Section 6's labor exemption from the Sherman Act. Moreover, unlike this case, *Radovich* did not involve a *unionized* labor market. Thus, the full force of the labor laws governing collective bargaining was not brought to bear.

[9] *See, e.g., Allen Bradley Co.* v. *Local Union No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 810 (1945) (union action in

lenged restraint affects only the labor—and not product—market. Therefore, traditional antitrust concerns are not implicated.

3. Consistent with this understanding, the Court has held that labor-management disputes over the terms and conditions of employment are not central to the focus of the antitrust laws. Thus, this Court has recognized that, "[a]s a general matter, a union's primary goal * * * to enhance the earnings and improve the working conditions of its membership * * * is not necessarily served, and indeed may actually be harmed, by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals." *Associated Gen. Contractors*, 459 U.S. at 539. Instead, "a separate body of labor law" has been developed to assist unions in obtaining that goal on a level playing field. *Id.* at 539-540. As a result, as the Court observed, "a union,

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combination with business groups to restrain competition in marketing goods implicates Sherman Act concerns); *Hunt* v. *Crumboch*, 325 U.S. 821, 826 (1945) (dispute between union acting alone and employee does *not* implicate Sherman Act concerns); *Jewel Tea*, 381 U.S. at 690 n.5 (the "crucial determinant" in deciding whether antitrust immunity attaches is the "relative impact on the product market"); *Connell Constr. Co.* v. *Plumbers & Steamfitters Local No. 100*, 421 U.S. at 625-626 (union agreement that made non-union firms ineligible to compete for available work in particular market implicates Sherman Act concerns); *Associated Gen. Contractors of Cal.* v. *California State Council of Carpenters*, 459 U.S. 519, 540 (1983) (union does not allege injury of the type the Sherman Act was designed to forestall where its "labor-market interests * * * predominate"). This distinction has not been lost on the commentators. *See, e.g.*, Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 Yale L.J. 1, 26 (1971) ("The line the Court has consistently sought to draw [in determining whether the Sherman Act applies to arrangements arrived at through the collective bargaining process] is the line between the product market and the labor market"); Archibald Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 254 (1955) ("No one seriously suggests that the antitrust policy should be concerned with the labor market per se").

in its capacity as bargaining representative, will frequently not be a part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains." *Id.* at 540.[10]

4. Finally, as detailed in Judge Winter's opinion for the Second Circuit in *National Basketball Association* v. *Williams*, 45 F.3d 684, 689-690 (2d Cir. 1995), *pet. for cert. pending*, No. 95-137, history suggests that Congress never intended the antitrust laws to be applied to multi-employer collective bargaining. The existence of multi-employer bargaining pre-dated (by a long shot) the passage of the Sherman Act in 1890. *See Employers' Associations, supra*, at 21-22. Yet, until recently, no one has seriously suggested that multi-employer bargaining is subject to the antitrust laws. *Williams*, 45 F.3d at 690. *Cf. Associated Gen. Contractors*, 459 U.S. at 539 ("Congress intended the [Sherman] Act to be construed in light of its common-law background").

As noted, moreover, Congress has considered and rejected proposals to restrict multi-employer bargaining. These proposals "were met with a storm of protest that their adoption would tend to weaken and not strengthen the process of collective bargaining and would conflict with the national labor policy of promoting industrial peace through collective bargaining." *Buffalo Linen*, 353 U.S. at 95. No one surmised that the proposals were somehow necessary to further national antitrust policy. And, as this Court has recognized, these events "cannot be said to indicate an intention [on Congress' part] to leave the resolution of [the fate of multi-employer bargaining] to future legislation." *Id.* at 95-96. Instead, the "compelling conclusion" is that Congress intended the

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[10] One leading commentator put it this way: "We may take it as a premise that the antitrust laws are not concerned with competition among laborers or with bargains over the price or supply of labor—its compensation or hours of service or the selection and tenure of employees." Archibald Cox, *supra*, at 255.

tradition of multi-employer bargaining to continue unabated subject to the existing ground rules. *Id. See Charles D. Bonanno Linen Serv.*, 454 U.S. at 409-410.

Petitioners' position in this case—that "Congress specifically intended employer associations to [be] subject to the antitrust laws," Pet. Br. at 15-16—simply cannot be squared with this history.

IV. WELL-ESTABLISHED CANONS OF STATUTORY CONSTRUCTION AND PRINCIPLES OF SOUND JUDICIAL DECISIONMAKING COMPEL THE CONCLUSION THAT MULTI-EMPLOYER BARGAINING GROUPS ARE IMMUNE FROM ANTITRUST LIABILITY FOR EXERCISING THEIR COLLECTIVE BARGAINING RIGHTS.

1. When faced with actual conflicts between the labor laws and the antitrust laws, this Court has sought to accommodate the policies underlying both statutes. *See, e.g., Connell Constr. Co.*, 421 U.S. at 622; *UMWA* v. *Pennington*, 381 U.S. 657, 666-668 (1965); *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. at 806-812.[11] As follows from the discussion in Parts II and III above, while subjecting multi-employer groups engaged in the exercise of their collective bargaining rights to antitrust liability would not materially advance antitrust policy, it would seriously undermine labor policy, particularly in the more typical industries such as construction in which multi-employer bargaining has proved to be a "vital factor" in fostering labor peace. *Buffalo Linen*, 353 U.S. at 95. A proper accommodation, therefore, requires that labor policy take precedence and that employers be shielded from antitrust liability for alleged restraints that affect only the labor market. This immunity must be broad enough to cover

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[11] Of course, there is no need for the Court to undertake an "accommodation" analysis in this case if it concludes, as it should, that Section 6 of the Clayton Act renders the antitrust laws inapplicable to restraints on competition in the labor market. *See supra* at 18-19 & n.8. That construction—based on the plain meaning of Section 6—eliminates any conflict here.

the entire collective bargaining process. Economic warfare is "part and parcel" of the collective bargaining process established by the labor laws. *NLRB* v. *Insurance Agents Int'l Union*, 361 U.S. at 489. Subjecting employers to antitrust liability for the exercise of some of their traditional weapons but not others would fundamentally disrupt the balance struck by Congress.

2. The long-standing policy of keeping the federal courts out of basic labor disputes should resolve any doubt that the balance in this case must be struck in favor of labor policy. Through both Section 20 of the Clayton Act (29 U.S.C. § 52) and the Norris-LaGuardia Act (29 U.S.C. §§ 101-115), Congress has evinced a clear intention of limiting judicial intervention into labor disputes. More to the point, "[w]hile the Norris-LaGuardia Act's bar [against] federal court labor injunctions is not explicitly phrased as an exemption from the antitrust laws, it has been interpreted broadly as a statement of congressional policy that the *courts must not use the antitrust laws as a vehicle to interfere in labor disputes.*" *H.A. Artists & Assocs.*, 451 U.S. at 714 (emphasis added). As Justice Goldberg put it in his *Jewel Tea* opinion, Congress, in enacting these laws, "intended to foreclose judges and juries from roaming at large in the area of collective bargaining * * * under cover of the antitrust laws." 381 U.S. at 716. As experience shows, the judiciary is simply ill-suited for such a venture. *See* Robert H. Bork, *The Antitrust Paradox* 83 (1978). Nevertheless, that is precisely what petitioners and their supporting amici invite here.

3. Other canons of statutory construction also support giving effect to the national labor policy here. For example, "it is a commonplace of statutory construction that the specific governs the general," *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (citation omitted), and that when two statutes conflict, the later in time should generally govern. *See Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974); 2B Norman J.

Singer, *Sutherland Statutory Construction* § 51.02 at 121 (5th ed. 1992). Both of these canons favor giving effect to the more specific and later-enacted national labor laws —which establish a clear policy of and framework for collective bargaining (*e.g.*, 29 U.S.C. §§ 151, 157, and 158(d)), recognize the existence of employer organizations (*see id.* §§ 104(b), 104(c), and 113(b)), and support an employer's right to unilaterally impose good faith bargaining proposals after impasse (*see supra* at 11)—over the earlier-enacted and more general Sherman Act, which broadly prohibits combinations in restraint of trade or commerce. 15 U.S.C. § 1. This conclusion is only strengthened by Section 6 of the Clayton Act (15 U.S.C. § 17), which unambiguously exempts restraints in "human labor" from the reach of the Sherman Act, and Congress' unequivocal rejection of proposals to limit multi-employer bargaining. *See supra* at 17-18, 21-22.

4. Principles of sound judicial decisionmaking also support affirmance of the decision below. One problem inherent in subjecting multi-employer bargaining units to liability under the antitrust laws is determining when that liability should attach. Even petitioners and their supporting amici are unable to agree on this fundamental point. Petitioners submit that *agreements* reached through multi-employer collective bargaining should be immune from antitrust liability, but that such immunity should lapse immediately upon expiration of the collective bargaining agreements. Pet. Br. at 45-46. As the government has observed, however, "[t]hat position cannot be reconciled with the obligation of employers under federal labor law to maintain the terms of employment established by an expired collective bargaining agreement until impasse." Gov't Br. at 16.

The government would extend antitrust immunity to the point of impasse—and, in some cases, beyond. Even following impasse, the government is forced to recognize that "[s]ome joint action by employers in a multi-

employer bargaining unit must, of course, fall within an implied exemption if the collective bargaining regime is to operate." *Id.* at 18 n.5. It will be up to the courts to determine under the government's multi-layer analysis whether antitrust liability has attached. That may be a straightforward determination in some cases; in others, it undoubtedly will not. The result will be uncertainty in an area in which multi-employer units—facing treble damages under the antitrust laws—simply cannot afford to "roll the dice" in deciding whether to exercise the full array of economic weapons available to them in the course of the collective bargaining process.

The decision below, in stark contrast, provides multi-employer bargaining units with meaningful guidance as to when antitrust liability will attach: multi-employer bargaining groups are immune from antitrust liability for exercising their collective bargaining rights as long as they do not restrain competition in a product market. *Cf. United States* v. *Topco Assocs.*, 405 U.S. 596, 609 n.10 (1972) ("Without the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act"). *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

5. A final consideration supporting affirmance is the promotion of continuity and stability in the body of antitrust law. Reversal of the decision below would extend antitrust law to an entirely new and distinct factual context—the multi-employer collective bargaining process. This would have an unsettling effect on established antitrust jurisprudence. Forced to subject employers to treble damages under the antitrust laws for good faith actions taken in the course of the collective bargaining process, courts are likely to apply existing antitrust rules more restrictively. Over time, this will produce an anomalous body of antitrust jurisprudence, which, in turn, could have a leveling effect on the application of the antitrust

laws to the subject that is in fact central to antitrust policy—preventing restraints on competition in the *product* market.[12]

CONCLUSION

For the foregoing reasons, and those in respondents' brief, the judgment below should be affirmed.

Respectfully submitted,

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[12] *Cf. Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1989) ("To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech").

FOR ARGUMENT

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IN THE

Supreme Court Of The United States

October Term, 1995

ANTONY BROWN, et al.,

Petitioners,

PRO FOOTBALL, INC. d/b/a
WASHINGTON REDSKINS, et al.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC. IN SUPPORT OF RESPONDENTS

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No. 95-388

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v.

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WASHINGTON REDSKINS, et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC. IN SUPPORT OF RESPONDENTS

This brief in support of respondents is submitted in accordance with Rule 37 of the Rules of this Court. Pursuant to Rule 37.3, The National Electrical Contractors Association, Inc. has obtained and has filed herewith the written consent of the petitioners and the respondents to the submission of this brief.

INTEREST OF THE *AMICUS CURIAE*

Petitioners seek to have the Court rule that the nonstatutory labor exemption to the antitrust laws is no longer applicable either (a) when the collective bargaining agreement expires, or (b) when the parties reach impasse in their

negotiations for a new agreement. The United States and the Federal Trade Commission as *amici curiae* urge the Court to hold that the non-statutory exemption ceases to apply upon impasse. If either the position of the petitioners or the modified position of the United States and the Federal Trade Commission (hereinafter "the Government") is adopted, multiemployer bargaining will cease to exist in its current state. It may cease to exist entirely.

Petitioners and their supporting *amici* suggest that many options will remain available to multiemployer groups even if they are subjected to antitrust scrutiny at either the time that the collective bargaining agreement expires or at impasse. In truth, subjecting the ***collective bargaining conduct*** of multiemployer groups to antitrust scrutiny will most certainly create too much risk and uncertainty for the vast majority of employers to participate in collective bargaining on a multiemployer basis. The reason for this is simple: If employers can lawfully implement unilaterally terms and conditions of employment under the National Labor Relations Act (hereinafter "NLRA") yet be faced with antitrust claims if they do the same thing on a group basis, they will opt to bargain separately.

The National Electrical Contractors Association, Inc. (hereinafter "NECA") has a vital stake in the continued health of multiemployer bargaining. Moreover, because of its status as the largest organization of unionized electrical contractors in the United States, NECA is in a unique position to contribute to the Court's understanding of the practical harm that would occur if this petition is granted and the antitrust laws are applied to traditional collective bargaining.

NECA is a construction trade association composed of approximately 4000 electrical contractors served through 119 chapters in the United States chartered by and affiliated with the National Association. The primary purpose of these

chapters is to act as multiemployer bargaining agents for the negotiation and administration of collective bargaining agreements on behalf of electrical contractors who authorize the local chapters to act as their collective bargaining agent with the appropriate local union of the International Brotherhood of Electrical Workers, AFL-CIO. The number of contractors, including both members and nonmembers of NECA, that authorize NECA chapters to bargain on their behalf is approximately 15,000. Chapters frequently negotiate more than one collective bargaining agreement with a local union or local unions of the IBEW, depending upon the type of work being performed. In all, collective bargaining agreements between NECA chapters and IBEW local unions cover more than 160,000 employees.

Multiemployer bargaining in the electrical construction industry has been a resounding success. The industry is largely strike-free. Productivity within the trade is excellent and increasing. Journeymen electricians are among the highest paid craftsmen. Much of this stability can be traced to the fact that labor and management bargain and engage in contract administration during the term of the labor agreement on a multiemployer basis. If this petition is granted, the landscape of collective bargaining in this industry, which relies nearly exclusively upon multiemployer bargaining, will be drastically affected.

It is NECA's intention in this brief to address the petitioners' contention that their position is consistent with federal labor policy and does not threaten multiemployer bargaining. This analysis from the perspective of the unionized side of the electrical construction industry is not represented by any of the parties and, therefore, would prove useful to the Court.

SUMMARY OF ARGUMENT

1. There is no place for application of the antitrust laws to conduct contained within the collective bargaining process. The nonstatutory labor exemption must apply to all aspects of the collective bargaining process as long as the parties do not seek to impose restraints upon third parties.

Consistent with that principle, neither this Court nor the Courts of Appeal have sought to impose the antitrust laws on either labor or management for conduct confined to the collective bargaining relationship. Only when one or both of the parties to the collective bargaining relationship seek directly to impose terms and conditions of employment upon third parties or to control the product market under the guise of collective bargaining have the federal courts stepped in to apply the antitrust laws.

2. Multiemployer bargaining operates in virtually all industries in the United States. In the construction industry, where employees may work for one employer one week and another employer another week, and where most employers are not large businesses, multiemployer bargaining is dominant. Both the Congress and the Court have indicated that multiemployer bargaining is not just a lawful means by which to engage in collective bargaining, but a process of bargaining that is worthy of protection to further the national labor policy of promoting peaceful and positive labor relations.

If traditional collective bargaining is going to thrive, it can only do so without the imposition of the antitrust laws as another layer of regulation atop the existing framework established under the National Labor Relations Act. Allowing recourse to the antitrust laws to enable one party to a multiemployer collective bargaining relationship to affect directly terms and conditions of employment that are the

subject of that relationship will destroy the legal framework carefully constructed under the National Labor Relations Act to promote good faith collective bargaining.

3. The threat of antitrust exposure to the average small business contractor for participating in multiemployer bargaining will cause many employers to abandon it. Even those who stay may ultimately leave because of the ever-growing weakness of the multiemployer group caused by the first wave of contractors opting out of multiemployer bargaining. Petitioners and the Government are plainly wrong that the antitrust exposure of post-contract termination conduct in a multiemployer setting will still leave the employers and the multiemployer bargaining agent with sufficient options to preserve multiemployer bargaining. With all due respect to the proponents of that argument, it demonstrates a clear lack of understanding or appreciation for the nature of collective bargaining, the alternative available to employers, especially outside of professional sports, to bargain individually, and the simple fact that employers by the droves will opt out of multiemployer bargaining if the mere participation in it exposes them to antitrust liability.

ARGUMENT

I.

THIS COURT HAS NEVER EXPOSED PARTICIPANTS IN COLLECTIVE BARGAINING TO ANTITRUST LIABILITY FOR COLLECTIVE BARGAINING CONDUCT DIRECTED AT THE OTHER PARTY TO THE COLLECTIVE BARGAINING RELATIONSHIP WHERE THERE IS NO CONTENTION THAT THE CONDUCT HAS AN ANTICOMPETITIVE EFFECT ON THIRD PARTIES

Petitioners have characterized the decision below as "a bold and unrestrained expansion of what was once a carefully limited judge-made exemption from the antitrust laws." Petitioners' Brief (hereinafter "Pt. Br.") at 14. At the same time, the Government declares that "the Court of Appeals extended the exemption far beyond its proper scope." Brief of the United States and the Federal Trade Commission (hereinafter "U.S. Br.") at 6. To the contrary, as the Court below recognized, in the more than fifty years since the Court first enunciated standards for applying the antitrust laws in the labor relations context,[1] ***no*** court has ***ever*** ruled that employer collective bargaining conduct that is both contemplated and endorsed by federal labor law may constitute an antitrust violation, unless it is aimed at restricting the ability of a third party to compete. *See Brown v. Pro Football, Inc.,* 50 F.3d 1041, *cert. granted,* 116 S.Ct. 593 (1995).

Petitioners argue that the *sine qua non* for application of the nonstatutory labor exemption is the union's consent to the terms and conditions of employment implemented or

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[1] *See Apex Hosiery v. Leader*, 310 U.S. 469 (1940), and *United States v. Hutcheson*, 312 U.S. 219 (1941).

maintained by the multiemployer group. In arguing that the nonstatutory labor exemption is coextensive with the union's consent, petitioners place undue reliance on language in prior cases of this Court linking the nonstatutory exemption to the existence of a union employer agreement. As the Court of Appeals below correctly noted, this Court has never addressed the application of antitrust laws to employer conduct (as distinct from agreement) in collective bargaining. Since the Court has considered only union employer agreements in nonstatutory exemption cases, it is "hardly surprising" that the Court's holdings have been couched in terms of union employer agreements. *Brown*, 50 F.3d at 1050.

Specific union consent, as opposed to the noncompetitive effect of union organizing, has never been the rationale for the nonstatutory labor exemption. The Court's formulation of the nonstatutory exemption in *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), did not turn on the existence of an agreement, but on the recognition that the goals of federal labor law cannot be reached unless the anticompetitive effect of unionization is exempt from the antitrust laws:

> Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. ***The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions.*** See *Mine Workers v. Pennington*, *supra*, 381 U.S. at 666, 85 S.Ct. at 1591; *Jewel Tea*, *supra*, 381 U.S. at 692-693, 85 S.Ct. at 1603-1604 (opinion of White, J.) (emphasis supplied).

Connell, 421 U.S. at 622-623. **"The governing factor"** in determining the application of antitrust law, this Court stated, **"is the risk of conflict with the NLRA or with federal labor policy."** *Connell*, 421 U.S. at 637 (emphasis supplied).

In addition to the Court of Appeals below and the Second and Eighth Circuits, which have expressly rejected petitioners' theories,[2] the Ninth Circuit, in a decision by Justice Kennedy, has interpreted *Connell* to mean that the nonstatutory exemption applies to the full panoply of collective bargaining and not just to the collective bargaining agreement:

> In *Connell*, before finding that the nonstatutory exemption did not apply, the Court made extensive analysis of the anticompetitive effect of the challenged contract, which was not a collective bargaining agreement. Such analysis would have been unnecessary if the nonstatutory exemption were limited to restraints imposed by collective bargaining agreements.

Richards v. Neilsen Freight Lines, 810 F.2d 898, 905 (1987).

Moreover, petitioners' reliance on the absence of union consent to support its position here ignores the fact that multiemployer bargaining ***itself*** is consensual. *E.g. Retail Associates*, 120 N.L.R.B. 388 (1958); *The Evening News Ass'n*, 154 N.L.R.B. 1494 (1965). The union representing employees must have been notified of the formation of the multiemployer group and have ***assented*** to bargaining on a multiemployer basis. *Charles D. Bonanno Linen Service*, 454 U.S. 404, 420-421 (1982) (concurring opinion of Justice

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[2] *NBA v. Williams*, 45 F.3d 684 (1995), *petition for cert. pending*, No. 95-137; *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

Stevens).[3] The union's consent to participate in the multiemployer bargaining process should be enough to invoke the protection of the nonstatutory labor exemption.

II.
FEDERAL LABOR LAW REGARDING THE OPERATION OF MULTIEMPLOYER BARGAINING WOULD BE SEVERELY UNDERMINED BY APPLICATION OF THE ANTITRUST LAWS TO POST-CONTRACT OR POST-IMPASSE CONDUCT IN EVERYDAY COLLECTIVE BARGAINING BETWEEN THE TWO PARTIES TO THE COLLECTIVE BARGAINING RELATIONSHIP

A. Application of the Antitrust Laws to Collective Bargaining Conduct Would Strike at the Heart of Federal Labor Law and Destroy the Balance of Rights and Privileges Created By the NLRB to Effectuate Federal Labor Policy

"It is implicit in the entire structure of the [National Labor Relations] Act that the [National Labor Relations] Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107-08 (1970). The framework of rules the Board has developed to reinforce the bargaining process would be severely undermined if a union or employees could readily

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[3] In *North American Soccer League v. NLRB*, 613 F.2d 1379 (5th Cir. 1980), *reh'g denied*, 616 F.2d 568 (1980), the Court of Appeals upheld the National Labor Relations Board's determination that member clubs of the North American Soccer League were "joint employers" and that a single leaguewide bargaining unit was appropriate. The union petitioned for an election in the leaguewide unit. The case turned on the Board's finding that the soccer clubs were, in essence, one employer and does not stand for the proposition that multiemployer bargaining may be imposed on separate employers, or on unions under any circumstances.

invoke the operation of the antitrust laws after the contract expires or, alternatively, when impasse is reached.

Federal labor law and policy permits each party to employ a variety of economic tools to achieve its bargaining objectives. Unions can strike and/or picket. Employers can lock out. If and when impasse is reached, the NLRA permits the employer to implement unilaterally terms and conditions of employment consistent with its final pre-impasse proposal. *See Brown*, 50 F.3d at 1051-1054; *Powell v. NFL*, 930 F.2d 1302-1303; *NBA v. Williams*, 45 F.3d at 690-691 and cases cited therein. The Board has recognized unilateral implementation of contract proposals after impasse as a legitimate form of economic pressure that can often break the impasse and revive collective bargaining. *See Hi-Way Billboards*, 206 N.L.R.B. 22, 23 (1973), *enforcement denied*, 500 F.2d 181 (1974). *See also Bonanno Linen*, 454 U.S. at 727 n.9 (employer ability to implement unilateral changes counterbalances inability to withdraw from multiemployer bargaining upon impasse).

In addition, the impasse doctrine reflects ststutory policy. Section 8(d) of the NLRA [29 U.S.C. §158(d)] provides that the obligation to bargain requires the parties to meet and confer in good faith concerning terms and conditions of employment but "does not compel either party to agree to a proposal or require the making of a concession." The Board has given effect to this proviso by permitting employers to make unilateral changes if and when they have fulfilled their obligation to bargain in good faith but failed to reach agreement. In *Colorado-Ute Electric Ass'n*, 295 NLRB 607, 609 (1989), the Board stated:

> That the employer is free to implement changes after reaching good-faith impasse is another way of expressing the axiom that the employer's duty to bargain over proposed changes does not imply a

duty to agree to the union's counterproposals or to make a concession. See Section 8(d) of the Act. The employer's duty to bargain does not give the union a right to veto the proposed changes by withholding consent.

In support of their argument that antitrust liability for post-impasse conduct does not undermine federal labor policy, petitioners characterize impasse as the end of federally regulated collective bargaining. The foundation of petitioners' argument is *dicta* in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987), suggesting that the right of an employer to impose its final offer at impasse is a product of state common law. Based on this *dicta*, petitioners reason that prohibiting multiemployer groups from implementing their final offers after impasse does not create any conflict with federal labor law. Mere *dicta* cannot support such a radical departure from existing labor law jurisprudence. Petitioners' theory would mean that a state could freely prohibit the unilateral implementation of final offers by any employer after impasse, not just employers involved in multiemployer bargaining. It is doubtful that any court would consider this a permissible infringement on collective bargaining.[4]

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[4] Petitioners also argue that the Sherman Act is the type of "backdrop" statute of general applicability which has been held by this Court not to conflict with the NLRA, relying on *Fort Halifax* and *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 757 (1985). *Fort Halifax* held that a state law requiring payment of severance benefits was not preempted by federal labor law. *Metropolitan Life* held that federal labor law did not preempt a statute requiring insurance policies to include mandatory minimum benefits. The Sherman Act cannot legitimately be analogized to a minimum employment standard. Unlike a minimum standard, application of the Sherman Act as proposed by petitioners would do much more than establish some limitations on the

Moreover, petitioners' assertion that federal labor law is not concerned with post-impasse conduct is simply wrong. Impasse and post-impasse unilateral changes are part of the collective bargaining process governed by the NLRA, not the end of it. As the Board stated in *Hi-Way Billboards, Inc.*, 206 N.L.R.B. at 23:

> [A] genuine impasse is akin to a hiatus in negotiations. In the overall ongoing process of collective bargaining, it is merely a point at which the parties cease to negotiate and often resort to forms of economic persuasion to establish the primacy of their negotiating position. Moreover, the occurrence of a genuine impasse cannot be said to be an unexpected, unforeseen, or unusual event in the process of negotiations .... Therefore, it is clear that an impasse is but one thread in a complex tapestry of collective bargaining, rather than a bolt of a different hue. In short, a genuine impasse is not the end of collective bargaining.

The employer's ability to make unilateral changes during an impasse in bargaining is delimited by the statutory obligation to bargain. An employer may not make unilateral changes more favorable than the terms of its pre-impasse proposal because this "is necessarily inconsistent with a sincere desire to reach agreement with the union." *NLRB v. Katz*, 369 U.S. 736, 745 (1962). An employer may not make unilateral changes less favorable than the terms of its pre-impasse proposal because this derogates the union's status as collective bargaining representative. *NLRB v. Plainville Ready Mix Concrete Co.*, 44 F.3d 1320, 1340 (6th Cir. 1995), *cert. denied*, 116 S.Ct. 474 (1975).

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universe of substantive terms available for bargaining. It would directly affect the collective bargaining process.

Antitrust exposure for making post-impasse changes will upset the checks and balances the Board has devised over the years to foster vigorous collective bargaining. The prospect of impasse encourages unions to bargain in good faith. If post-impasse unilateral changes are outlawed, unions engaged in multiemployer bargaining will be able, at the very least, to freeze the status quo in terms and conditions of employment merely by inaction. Unions will have little incentive to engage in true give and take at the bargaining table because there will be no risk that the union may lose ground if it fails to negotiate an agreement.

Petitioners also argue that imposing antitrust liability on post-impasse concerted action of a multiemployer group will actually further federal labor policy because it will eliminate an incentive for employers to bargain in bad faith with the goal of forcing an impasse. Pt. Br. at 41-42. It hardly furthers federal labor policy to supplant federal labor law aimed specifically at promoting collective bargaining with the Sherman Act. The NLRA already contains remedies for "surface bargaining," (*i.e.* going through the motions of bargaining with no intent to reach agreement),[5] and for prematurely declaring impasse and unilaterally implementing changes when no lawful impasse has been reached.[6] These remedies are designed to enforce collective bargaining without destroying the collective bargaining relationship. Injecting the considerable penalties available under the antitrust laws into the collective bargaining relationship would frustrate this statutory scheme.

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[5] *Fairhaven Properties, Inc.*, 314 N.L.R.B. 763, 769-772 (1994); *Unbelievable, Inc.*, 318 N.L.R.B. No. 60 (August 30, 1995).

[6] *AMF Bowling Co.*, 314 N.L.R.B. 969, 969 (1994), *enforcement denied*, 63 F.3d 1293 (1995); *Control Services*, 315 N.L.R.B. 431 (1994).

B. Federal Labor Policy to Promote Multiemployer Bargaining Would Certainly Be Undermined if Either the Petitioners' or the Government's Theory Is Adopted

This Court has recognized that "in many industries," including construction, multiemployer bargaining is "a vital factor in the effectuation of the national labor policy of promoting labor peace through strengthened collective bargaining." *NLRB v. Truck Drivers*, 353 U.S. 87, 95 (1957) (*Buffalo Linen*). In *Buffalo Linen*, this Court upheld a Board decision permitting the seven remaining members of a multiemployer group to lock out employees in response to a strike against the eighth member because the goal of the concerted lockout was to protect bargaining on a multiemployer basis. *Buffalo Linen*, 353 U.S. at 93, 96. In *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404 (1982), this Court approved the Board's conclusion that neither impasse nor the ability of employers in a multiemployer group to execute individual interim agreements permits an employer to withdraw from multiemployer bargaining unilaterally. The Court noted that the Board had developed this rule "in the interest of the proper and pre-eminent goal [of] maintaining the stability of the multiemployer unit." *Bonanno Linen*, 454 U.S. at 419.

Petitioners' argument is that, once having consented to multiemployer bargaining, the union can resort to the antitrust laws to compel agreement on its terms if the collective bargaining framework established under the NLRA does not yield the results it wants. This ability to pick and choose between the NLRA and the Sherman Act completely undermines the statutory mandate of the Board to promote multiemployer bargaining. The Board has recently reaffirmed the rule that impasse is insufficient to permit withdrawal from multiemployer bargaining because it would destabilize

multiemployer bargaining in much the same way as the application of antitrust laws urged by petitioners in this case. The Board stated:

> Allowing any of the negotiating parties to withdraw from the unit after an impasse the length of the one at issue here would be to put the multiemployer bargaining process in jeopardy whenever bargaining reached an impasse phase and one of the participants was unsatisfied with its prospects for getting all that it wished in a multiemployer contract.

El Cerrito Mill & Lumber Co., 316 N.L.R.B. 1005 (1995). Similarly, the briefs of petitioners and their *amici* are punctuated by examples in professional sports of the complete disintegration of multiemployer bargaining into antitrust litigation when bargaining "got tough," *i.e.*, upon the first impasse in negotiations. The availability of an antitrust cause of action resulted, not in the temporary suspension of bargaining, but in the complete breakdown of the collective bargaining relationship.[7]

The Government contends that suspending the nonstatutory exemption at impasse can be reconciled with federal labor policy because the employer members of multiemployer bargaining groups are permitted under the NLRA to enter into

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[7] These examples resulted from cases holding that employees could escape the nonstatutory labor exemption if they decertified the union. *See* Pt. Br. At 42-44. Petitioners argue that their theory would promote labor policy by eliminating decertification as a prerequisite to antitrust litigation. NECA submits that a rule allowing an antitrust action based on conduct initiated during the collective bargaining relationship if the employees decertify the union is not the way to reconcile federal labor policy with the antitrust laws. Nor is eliminating decertification as a prerequisite to antitrust litigation. Stability in collective bargaining is best assured by applying the nonstatutory exemption to the entire collective bargaining process envisioned by federal labor law.

individual interim agreements with the union once impasse is reached. By entering into interim agreements, the Government contends, the employers can both satisfy federal labor law and avoid antitrust liability arising either from maintenance of the status quo post-impasse or the joint unilateral implementation of pre-impasse contract proposals. The obvious flaw in the Government's analysis is that the it offers the employers no option other than reaching agreement with the union. This is patently contrary to the policies of the NLRA, which are to promote collective bargaining, not to compel agreement. *See* Section 8(d) [29 U.S.C. § 158(d)] (NLRA does not require either party to agree); *H.K. Porter Co.*, 397 U.S. at 106-07 (NLRA grounded on the premise of freedom of contract). Neither the policies of the NLRA nor the Sherman Act would be furthered by allowing one party's control over the other party's antitrust immunity to be used as an economic weapon in collective bargaining.

C. The Threat of Antitrust Liability for Collective Bargaining Conduct Will Drive Electrical Contractors Away from Multiemployer Bargaining

The position shared by petitioners and the Government would leave multiemployer units and their constituent members with the Hobson's choice of risking treble damages in an antitrust suit or foregoing the ability to make any changes in the status quo while the collective bargaining relationship exists. Unlike employers bargaining separately, employers affiliated with a multiemployer group would lose an important means of putting economic pressure on the union to reach a compromise and the flexibility to make necessary business changes if and while bargaining has stalled.

The vast majority of employers in the electrical contracting industry now participating in multiemployer bargaining will not risk such a choice. Multiemployer bargaining in the electrical contracting industry is strictly

voluntary. While professional sports leagues may be forced to adapt to the constraints of antitrust exposure because participation in multiemployer bargaining is enforced by the league, NECA contractors are subject to no such requirement. Faced with even the possibility that their concerted collective bargaining conduct could be scrutinized under the antitrust laws as well as the labor laws and that the rules of the game have been changed so as to limit what they can do as a group, they will opt to withdraw from multiemployer units. Prudent contractors who can be put out of business merely by having to defend a frivolous antitrust suit will opt to bargain with the union independently or, having lost the benefits of group bargaining, may seek nonunion status.[8]

Any advantages of group bargaining will certainly cease to exist. The fact that bargaining on a group basis limits your choices will alone be sufficient to erode multiemployer bargaining. Furthermore, the whole thrust of multiemployer bargaining is to act as a united front. Even if the multiemployer group survives in some fashion, the incentive will be created for employers to avoid bargaining on a group basis once the contract expires or the spectre of impasse has been raised. At the point of either contract expiration or impasse, employers acting out of fear of the antitrust laws will be begging to be the first contractor to sign an interim agreement. Once a number of interim agreements are signed, multiem-

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[8] Petitioners' contention that the employers are only subject to "unreasonable" restraints under the antitrust law fails to appreciate that the threat of antitrust exposure is more than enough to undermine multiemployer bargaining. Pt. Br. at 40. Additionally, the contention that most industries can obtain an agreement from their unions not to sue would serve to reduce the employer groups to subservient status at the feet of their union counterparts every time negotiations commence. Employers could easily find themselves bargaining wages in return for some form of antitrust immunity.

ployer bargaining has collapsed and the "interim agreements" have become final agreements.

These alternative scenarios all point to two conclusions. First, the introduction of the antitrust weapon as a basis to weigh the *bona fides* of the employer's position drastically alters the dynamics of the negotiation process to the disadvantage of the employers, thereby undermining the fundamental principles of the duty to bargain under the NLRA. Second, contrary to the principles enunciated by this Court in *Bonanno Linen* and *Buffalo Linen*, multiemployer bargaining will cease to be a favored method of negotiations simply because the risks associated with it will outweigh its advantages.

CONCLUSION

For the foregoing reasons, NECA respectfully submits that the Court below, consistent with the decision of the Second Circuit in *Williams* and the Eight Circuit in *Powell,* properly rejected the contention that traditional multiemployer collective bargaining is or should be subject to the antitrust laws. Adoption of this unsupported theory would drastically alter the balance that has been crafted under the federal labor laws and would seriously harm if not destroy traditional multiemployer bargaining.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1995

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v.

PRO FOOTBALL, INC.,
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This *amicus* brief is being filed with the written consent of the parties pursuant to Rule 37.3 of this Court.

INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

The National Railway Labor Conference (NRLC) is an unincorporated association that includes among its members all of the nation's Class I freight railroads. Among other things, the NRLC (through its National Carriers' Conference Committee) represents member railroads in multi-employer collective bargaining under the Railway Labor Act (RLA). Multi-employer bargaining in the railroad industry, commonly referred to as "national handling," antedates the enactment of the RLA in 1926, and at least since 1931 has occurred in consecu-

tive "rounds" of general wage and rules movements up to and including the present day. The preservation of the railroads' right to bargain on a multi-employer basis is of critical importance, therefore, to the NRLC and member railroads and to effective collective bargaining under the RLA.

The utility and success of multi-employer bargaining in the railroad industry, as in industries subject to the National Labor Relations Act (NLRA), would be crippled if not destroyed altogether if it does not include the right of the employers to mutually engage in self-help in support of their common bargaining proposals, if and when resort to such self-help is permissible under the applicable labor statute, without running the risk of violating the Sherman Antitrust Act and subjecting themselves to treble damages and even criminal punishment.

Although this case has arisen under the NLRA, as the Court has noted, the courts "have referred to the NLRA for assistance in construing" the RLA. *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 383 (1969). But the Court also emphasized that the NLRA "cannot be imported wholesale into the railway labor arena," and even "rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Ibid.* We believe that the Court of Appeals correctly held that a multi-employer promulgation, after an impasse in multi-employer bargaining under the NLRA, is exempt from the antitrust laws. Hence, we urge the Court to affirm the Court of Appeals essentially for the reasons stated by that Court and by respondents.

We do not here repeat or elaborate at length upon those arguments, but rather primarily demonstrate that there are even stronger reasons in the scheme of the RLA and the history of multi-employer bargaining thereunder to uphold an antitrust exemption for a multi-employer promulgation of multi-employer proposals. Among other things, as we shall demonstrate, the RLA expressly authorizes a "group of carriers" to designate a common bar-

gaining agent to bargain on their behalf (45 U.S.C. § 151 Sixth), and this Court has upheld the right of a multi-employer group of railroads to promulgate their proposals following exhaustion of the procedures required by the RLA. *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963). Consequently, we urge the Court, particularly if it should reverse the decision below, to make clear in its opinion that its decision is limited to a multi-employer promulgation under the NLRA and is not intended to cast any doubt upon the *Locomotive Engineers* decision or otherwise upon the validity of a multi-employer promulgation under the RLA.

ARGUMENT

Although the NLRA does "not expressly authorize or deal with multiemployer units," *Charles D. Bonanno Linen Service* v. *NLRB*, 454 U.S. 404, 409 (1982), the Court consistently has recognized the value of multi-employer bargaining to promote labor peace. Among other things, the Court pointed out in *Labor Board* v. *Truck Drivers Union*, 353 U.S. 87, 94-95 (1957), and reiterated in *Bonanno* that:

> ". . . multiemployer bargaining had 'long antedated the Wagner Act' and had become more common as employers, in the course of complying with their duty to bargain under the Act, 'sought through group bargaining to match increased union strength.' 353 U.S. at 94-95 (footnote omitted). Furthermore, at the time of the debates on the Taft-Hartley amendments, Congress had rejected a proposal to limit or outlaw multiemployer bargaining. The debates and their results offered 'cogent evidence that in many industries multiemployer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining.' *Id.*, at 95."

454 U.S. at 409. In short, multi-employer bargaining "offers advantages to both management and labor"; it

also "encourages both sides to adopt a flexible attitude during negotiations" since "employers can make concessions 'without fear that other employers will refuse to make similar concessions to achieve a competitive advantage,' and a union can act similarly 'without fear that the employees will be dissatisfied at not receiving the same benefits which the union might win from other employers.' " 454 U.S. at 409 n.3.

This Court also consistently has upheld the right of a multi-employer group to engage in mutual self-help, when otherwise permissible under the NLRA, to preserve and protect multi-employer bargaining. Thus, *Truck Drivers Union* held that, in response to whipsaw strikes of one or more of the employers engaged in multi-employer bargaining, the others could lock out their employees "as a defense to a union strike tactic which threatens the destruction of the employers' interest in bargaining on a group basis." 353 U.S. at 93. The Court, in *Labor Board* v. *Brown*, 380 U.S. 278 (1965), held that the members of a multi-employer group may both lock out their employees in response to whipsaw strikes and utilize temporary replacements so as to continue to operate. The "compelling inference is that this was all part and parcel of respondents' defensive measures to preserve the multi-employer group in the face of the whipsaw strike." *Id.* at 284.

Moreover, in *Bonanno* the Court held that an impasse in multi-employer bargaining does not justify withdrawal from such bargaining. As the NLRA does not give employers or unions a right to multi-employer bargaining, such bargaining is voluntary under that Act. But, the NLRB "has sought to further the utility of multiemployer bargaining as an instrument of labor peace by limiting the circumstances under which any party may unilaterally withdraw during negotiations." 454 U.S. at 412. An "impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through a change in mind or the application of economic force,' " so that for this and other reasons "permitting

withdrawal at impasse would as a practical matter undermine the utility of multiemployer bargaining." *Ibid.*[1]

We believe that those decisions in themselves are sufficient to demonstrate that subjecting multi-employer bargaining under the NLRA to the constraints of the Sherman Act after an impasse in bargaining, as the Government urges, much less after the termination of a collective bargaining agreement, as the petitioners urge, would be antithetical to the scheme of the later-enacted NLRA. Indeed, if a multi-employer bargaining agreement would violate the Sherman Act but for the labor exemption, a multi-employer proposal to make such an agreement would do so as well—an agreement among competitors as to what price they will offer to prospective buyers or sellers of goods or services ordinarily is sufficient to establish a violation in a business rather than a labor context.[2] It is difficult to see how multi-employer bargaining could, as a practical matter, be carried on at all if the labor exemption terminates when a labor agreement terminates as that is the point, or only shortly after the point, at which negotiations upon a new agreement ordinarily commence.[3] And, since an impasse in multi-employer bargaining does not terminate the duty to bargain on that basis in a good faith effort to reach a multi-employer agreement, the employers must continue to have the right to make multi-employer offers if they are eventually to

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[1] Although the NLRB has rejected the "proposition that the negotiation of truly interim, temporary agreements, as distinguished from separate, final contracts, is 'inconsistent with the concept of multiemployer bargaining units' "; it "is 'vital' to understand that the Board distinguishes 'between interim agreements which contemplate adherence to a final unitwide contract and are thus not antithetical to group bargaining and individual agreements which are clearly inconsistent with, and destructive of, group bargaining.' " 454 U.S. at 414-415 (citation omitted).

[2] See, *e.g.*, *Mandeville Farms* v. *Sugar Co.*, 334 U.S. 219, 235-236 (1948).

[3] See the *proviso* to § 8(d) of the NLRA, 29 U.S.C. § 158(d).

make a multi-employer labor agreement. Multi-employer imposition of a multi-employer offer after an impasse is "part and parcel" of the employers' efforts to preserve the multi-employer group, and is an "application of economic force" that can break the impasse and lead to a multi-employer labor agreement.

Application of the Sherman Act would be even more antithetical to the statutory scheme of the RLA, 45 U.S.C. §§ 151 *et seq.*, and to multi-employer bargaining thereunder. That Act, "like the National Labor Relations Act, does not undertake governmental regulation of wages, hours or working conditions. Instead, it seeks to provide a means by which agreements may be reached with respect to them." *Terminal Assn.* v. *Trainmen*, 318 U.S. 1, 6 (1943). The RLA "was passed in 1926 to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce. The problem of strikes was considered to be particularly acute in the area of 'major disputes,' those disputes involving the formation of collective agreements and efforts to change them." *Shore Line* v. *Transportation Union*, 396 U.S. 142, 148 (1969).

The RLA thus "provides a detailed framework to facilitate the voluntary settlement of major disputes." *Railroad Trainmen* v. *Terminal Co., supra*, 394 U.S. at 378. The procedures provided in that regard "are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Railway Clerks* v. *Florida E.C. R. Co.*, 384 U.S. 238, 246 (1966). Those procedures are succinctly summarized in *Railroad Trainmen, supra*, 394 U.S. at 378, as follows:

> "A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Medi-

> ation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10."

The Court then pointed out that, while the text of the RLA does not "specify what is to take place once these procedures have been exhausted":

> "Implicit in the statutory scheme, however, is the ultimate right of the disputants to resort to self-help—'the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration.' *Florida E.C. R. Co.* v. *Railroad Trainmen*, 336 F.2d 172, 181 (1964). We have consistently so held in a long line of decisions. *Railway Clerks* v. *Florida E.C. R. Co.*, 384 U.S. 238, 244 (1966); *Locomotive Engineers* v. *Baltimore & O. R. Co.*, 372 U.S. 284 (1963); *Railroad Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960); *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 725 (1945)."

394 U.S. at 378-379.

One of the cited cases—that "consistently" held that the "ultimate right . . . to resort to self-help" is "[i]mplicit in the statutory scheme" of the RLA—upheld the right of some 200 railroads to promulgate, as a multi-employer group, their "intended changes in agreements affecting rates of pay, rules, and working conditions" as set forth in their written notices pursuant to § 6 of the RLA, after the major dispute provisions of the RLA had been ex-

hausted in multi-employer bargaining. *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284, 285, 286, 290-291 (1963). The unions served with those notices sued for a judgment that the proposed rule changes would violate the RLA, but this Court held otherwise. Hence, the "only question" remaining was "whether the record before us sustains the findings of both lower courts that the parties have exhausted the procedures provided by the Railway Labor Act for major disputes such as that involved here." 372 U.S. at 290. As that finding was upheld, the Court sustained the dismissal by the lower courts of the unions' complaint.

Whatever may be the situation under the NLRA, therefore, it is clear under the RLA that a multi-employer group has a right, as a part of the self-help that is implicit in that Act, to impose or promulgate as a group their proposals with respect to rates of pay, rules or working conditions that are mandatorily bargainable under the RLA, if and when the major dispute procedures of the Act have been exhausted in multi-employer bargaining under the Act.[4] As we next show, it could hardly be otherwise in view of the long history of multi-employer bargaining in the railroad industry and the express authorization in the RLA for the designation by a "group" of railroads of a common representative to bargain on their behalf with the representatives of the employees involved.

Multi-employer bargaining in the railroad industry dates back at least to 1915 when numerous carriers appointed a committee to negotiate on their joint behalf with four unions proposing to establish by agreement an 8-hour day. See Harry D. Wolf, *Railroads*, in *How Col-*

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[4] Although not in a multi-employer context, the Court observed, in *TWA, Inc.* v. *Flight Attendants*, 489 U.S. 426, 439 (1989), that its "cases have read the RLA to provide greater avenues of self-help to parties that have exhausted the statute's 'virtually endless' . . . dispute resolution mechanisms than would be available under the NLRA." (Citation omitted.) See, also, *id.* at 442.

lective Bargaining Works in Leading American Industries, 318, 325 (1942). There are numerous mentions of multi-employer bargaining, sometimes on a regional rather than national basis, in the legislative history of the RLA as enacted in 1926. Among other things, Donald Richberg testified (on behalf of rail labor) that no limit was placed on the number of emergency board members as there could be "a national situation involving a great many roads and a great many labor organizations" for which "you might want to creat a very large board . . . ." See 2 *The Railway Labor Act of 1926—A Legislative History*, § 2, at 96 (Michael H. Campbell & Edward C. Brewer, III, eds., 1988).[5]

The 1926 Act did not expressly address multi-employer bargaining. However, the RLA was reenacted with amendments in 1934 that, among other things, provided expressly for such bargaining by adding § 1 Sixth (48 Stat. 1187) under which:

> "The term 'representative' means any person or persons, labor union, organization, or corporation *designated either by a carrier or group of carriers* or by its or their employees *to act for it or them.*"

45 U.S.C. § 151 Sixth (emphasis added). In addition, § 2 Second was revised (48 Stat. 1187) to provide that:

> "All disputes between a carrier *or carriers* and its *or their* employees shall be considered, and if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier *or carriers* and by the employees thereof interested in the dispute."

45 U.S.C. § 152 Second (emphasis added to the words added in 1934).

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[5] The 1926 RLA "was, and was acknowledged to be, an agreement worked out between management and labor, and ratified by the Congress" so "the statements of the spokesmen for the two parties are entitled to great weight in the construction of the Act." *Chicago & N.W. R. Co.* v. *Transportation Union*, 402 U.S. 570, 576 (1971). Mr. Richberg was the spokesman for labor.

These amendments followed the commencement of modern multi-employer bargaining in the railroad industry, in the midst of the Great Depression, under circumstances in which it was crucial for the survival of the industry. In 1932, the major railroads and railway labor unions agreed (after multi-employer negotiations) to wage reductions necessary to carry the railroads through the crisis, which were extended by national agreements in 1933 and 1934. The 1934 agreement also provided for phasing out those wage reductions, and expressed the view of the parties that future general wage movements "should be conducted nationally." Those movements soon were expanded to include other subjects, and since then there has been a series of national wage and rules movements which have resulted in hundreds of national agreements between the participating railroads and union or unions, following multi-employer bargaining.[6]

Hence, a union contention that multi-employer bargaining is dependent upon agreement between the parties to bargain on that basis, as it is under the NLRA, was rejected in *Brotherhood of Railroad Train.* v. *Atlantic Coast Line R. Co.*, 383 F.2d 225, 228-229 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968); although national handling of the particular dispute is not "obligatory" if not compatible with "good faith bargaining in the railroad industry" as commanded by § 2 First of the RLA in the light of the "practical appropriateness of mass bargaining" as shown by the "historical experience in handling any similar national movements." *Id.* at 229.

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[6] These agreements (including the 1932-1934 agreements) are in the files of the NRLC. See, also, Wolf, *supra* at 340; *International Ass'n of M. & A.W.* v. *National Ry. Labor Conf.*, 310 F. Supp. 905, 911-912 (D.D.C. 1970), *appeal dismissed as moot*, 463 F.2d 872 (D.C. Cir. 1972). Collective bargaining agreements in the railroad industry usually do not contain a specific expiration date and continue in effect until changed pursuant to that Act. Instead, they contain what commonly is referred to as a "moratorium" under which proposals for future changes cannot be served under § 6 of the Act or progressed until a specified future date. Thus, a particular general wage and rules movement usually commences when the moratoriums in the last national agreements expire.

That case involved only a discrete crew size issue, as to which there had "never been a national . . . rule" and as to which a presidential board had concluded that "a national prescription of crew size would be wholly unrealistic." *Id.* at 229. But, as we have noted, national handling has been the practice in general wage and rules movements under the RLA since at least 1931 and has resulted in hundreds of national settlements with railroads that have designated a group bargaining representative. No emergency board or other neutral body or court has deemed such multi-employer bargaining to be inappropriate in those circumstances. Rather, Emergency Board No. 98, in recommending national union-shop agreements with the rail labor unions, pointed out that the parties "have repeatedly and consistently recognized national handling as an essential procedure for disposing of national movements on a great diversity of issues covering not merely wages but a wide variety of rules changes . . . ." Report to the President by Emergency Board No. 98 (Feb. 14, 1952) at 57. So, too, the National Mediation Board (which mediates major disputes under the RLA) has commended and encouraged national handling of general wage and rules movements "as in the best interests of the nation in helping to preserve labor peace over an extended period of time" with respect to issues that otherwise could give rise to hundreds of disputes with individual railroads. See its Forty-Fourth Annual Report (1978) at 2; Third Annual Report (1937) at 3.

Accordingly, the court that decided *Atlantic Coast Line* subsequently confirmed that multi-employer bargaining with the representative designated by a "group of carriers" in a general wage and rules movement was obligatory. *Delaware & Hudson Railway Co.* v. *United Transp. Union*, 450 F.2d 603, 608-609, 609-610 n.14 (D.C. Cir. 1971), *cert. denied*, 403 U.S. 911 (1971).[7] The court

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[7] See, also, *International Ass'n of M. & A.W.* v. *National Ry. Labor Conf., supra*, 310 F. Supp. at 911-912; *United Transportation U.* v. *Burlington Northern, Inc.*, 325 F. Supp. 1125, 1131 (D.D.C.

in that case held that, after exhaustion of the major dispute procedures of the RLA, the union could engage in selective strikes for the purpose of coercing a national agreement rather than separate agreements with individual railroads. *Id.* at 611-619. The court pointed out in support of that holding that the carriers' right to self-help includes a multi-employer promulgation:

> ". . . the fact that the present dispute involves a matter subject to national handling means that the carriers may make a national response to defend against a selective strike that jeopardizes national bargaining. *At the very least they could introduce unilaterally on a national basis the work rules they proposed in their Section 6 counteroffer.* And they could impose a national lockout if necessary to defend the principle of national bargaining."

Id. at 614 (emphasis added).[8]

1973); *Chicago Burlington & Quincy R.R.* v. *Railway Emp. Dept.*, 301 F. Supp. 603, 607 (D.D.C. 1969).

[8] The unions sometimes have contended that a railroad which exercises its option under § 1 Sixth and § 2 Second of the RLA to designate an individual representative, rather than a group representative, to bargain on an individual carrier basis, must nonetheless bargain on a multi-employer basis with other railroads that designated a group representative. That contention was rejected in *American Ry. and Airway Sup'rs* v. *Soo Line R. Co.*, 891 F.2d 675 (8th Cir. 1989), *cert. denied*, 489 U.S. 809 (1990), and in *United Transp. Union* v. *Grand Trunk Western R. Co.*, 901 F.2d 489 (6th Cir. 1990), *cert. denied*, 498 U.S. 815 (1990). Those cases relied upon § 2 Third of the RLA which "expressly preserves each party's right to choose its own bargaining representative," 901 F.2d at 490, although withdrawal from national handling after bargaining had commenced would be inconsistent with § 2 First. That rationale also supports the view that refusal of a union to bargain with a representative designated by a group of carriers to bargain on a multi-employer basis also would be inconsistent with § 2 Third. And since the national or international union, rather than a local or other subordinate unit, is certified by the National Mediation Board under § 2 Ninth of the RLA to bargain on behalf of employees, requiring a national union to bargain on a multi-employer basis does not contravene § 2 Third. See, *e.g.*, *Neal* v. *System Bd. of Adjustment*, 348 F.2d 722 (8th

Since the *Delaware & Hudson* decision (as before), the railway labor unions have consistently bargained on a multi-employer basis with the railroads that have designated a common "group" representative to bargain on that basis in every round of general wage and rules movements.[9]

We submit, therefore, that multi-employer bargaining under the RLA is firmly grounded in the language of that Act and is a practice that has been followed consistently since 1931 and occurred even prior to the RLA. It also is clear that the right of the railroads to impose their proposals in such bargaining, on a multi-employer basis, after exhausting the Act's procedures in multi-employer bargaining, is implicit in the scheme of

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Cir. 1965); *American Train Dispatchers Ass'n* v. *Union Pacific R.R.*, 679 F. Supp. 1535, 1543 (W.D. Mo. 1987). The *Soo Line* decision noted that the unions have the option of bargaining on an individual union or multi-union basis. 891 F.2d at 679. Both options have been exercised in the past. Thus, under the statutory scheme of the RLA, unlike the NLRA, unions may insist on bargaining together as a group and carriers may likewise insist on bargaining together as a group, subject to the requirements of § 2 First. The Court need not dwell on these matters, however, as the case before it concerns only bargaining under the NLRA. Our point is simply that there are important differences in the statutory schemes of the RLA and the NLRA with respect to multi-employer bargaining.

[9] The only exception is that two (of the 11) national unions currently party to such a movement are contending that they have a right under the RLA to bargain on an individual railroad basis. That contention, and the carriers' contention that national handling is obligatory, is now pending on cross-motions for summary judgment before Judge Hogan on the United States District Court for the District of Columbia. In *Alton & Southern Railway, et al.* v. *Brotherhood of Maintenance of Way Employes*, Civil Action No. 94,2365, as to that union; and in consolidated cases, *International Brotherhood of Locomotive Engineers, et al.* v. *Consolidated Rail Corporation, et al.*, Civil Action No. 95-0020, and *Atchison, Topeka & Santa Fe Railway, et al.* v. *International Brotherhood of Locomotive Engineers*, Civil Action No. 95-0387, as to that union.

the RLA. Hence, to subject such multi-employer bargaining and multi-employer promulgations under the RLA to the constraints of the antitrust laws would be antithetical to the scheme of the later-enacted RLA, whatever might be the case with respect to the NLRA.

CONCLUSION

The decision and judgment by the Court of Appeals should be affirmed, but even if it should be reversed the Court should make clear that its decision is not intended to apply under the RLA or to cast any doubt upon its decision in *Locomotive Engineers* v. *B. & O. R. Co.*, *supra*, upholding a multi-employer promulgation of the railroads' proposals following the exhaustion of the major dispute procedures of the RLA.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,
Petitioners,

v.

PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION, INC. AND TRUCKING MANAGEMENT, INC. AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION, INC. AND TRUCKING MANAGEMENT, INC. AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

This brief is submitted by the Bituminous Coal Operators' Association, Inc., and Trucking Management, Inc., as amici curiae in support of respondents. The parties have consented to the filing of this brief. Copies of their letters of consent have been filed with the Clerk of the Court.

INTEREST OF AMICI CURIAE

The Bituminous Coal Operators' Association, Inc. ("BCOA") is a multiemployer bargaining association that, for nearly fifty years, has negotiated with the United

Mine Workers of America ("UMWA") for the major collective bargaining agreement in the coal industry, the National Bituminous Coal Wage Agreement ("NBCWA"). In particular, BCOA has negotiated numerous amendments to the 1950 NBCWA, as well as the NBCWAs of 1971, 1974, 1978, 1981, 1984, 1988, and 1993. BCOA members include large and small coal companies throughout the country. The current collective bargaining agreement negotiated by BCOA, the NBCWA of 1993, covers approximately 50,000 active UMWA-represented employees and approximately 100,000 retirees who receive pension, health, and other benefits as negotiated in the NBCWA.

Trucking Management, Inc. ("TMI") is a multiemployer bargaining association that negotiates with the International Brotherhood of Teamsters ("Teamsters") for the major collective bargaining agreement in the trucking industry, the National Master Freight Agreement ("NMFA"). TMI and its predecessor, Trucking Employers, Inc. ("TEI"), have negotiated the NMFA with the Teamsters every three years since 1964. TMI's member carriers include the largest and smallest trucking companies in the United States, employing from two to more than 17,000 regular employees. The current collective bargaining agreement negotiated by TMI, the NMFA of 1994, governs the terms and conditions of employment for approximately 110,000 Teamster-represented employees throughout the country.

BCOA and TMI are interested in this case because it concerns fundamental principles of federal labor law and policy that affect all industries that negotiate on a multiemployer basis, including coal and trucking. The positions taken by the petitioners, the players associations, and the government, are a radical departure from decades of precedent and, if accepted by this Court, would prolong labor disputes, expose BCOA and TMI member companies to potentially ruinous antitrust litigation, and effectively put an end to multiemployer bargaining.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a traditional labor dispute in an unusual setting, namely, professional football. The subject of the dispute (the employer's unilateral implementation of a wage proposal after negotiating in good faith to an impasse) has been grist in the mill of traditional labor law for more than fifty years. The "industry" in which the dispute arises, however, is not the typical American workplace.

Apart from the rather obvious differences between a football field and a factory, mine, or warehouse, the various teams in the National Football League do not compete economically in the same sense that coal companies or trucking companies do. NFL teams cannot do without one another. In a real sense, all NFL teams are engaged in a single venture, in whose success they have a shared interest. Although competitors on the field, the various teams are economic joint venturers, which depend on each other to produce the entertainment product that they sell. Of necessity, the teams must act as a single entity in establishing playing rules, schedules, officiating standards, roster regulations, and other measures that affect the on-the-field competition among the league's members. Under the labor laws, the NFL could be viewed as a "single employer." If that approach were followed, this case would be over (and BCOA and TMI would have no need to participate), because no one questions the right of a single employer, following an impasse in collective bargaining, to implement terms and conditions of employment included within the employer's pre-impasse bargaining proposal.

As the case comes to this Court, however, the parties and the courts below all appear to be proceeding on the assumption that, at least with respect to player compensation, the NFL teams are separate employers that participate on a multiemployer basis in collective bargaining with the players' union. Not being part of the football

business, and not having any direct interest in the compensation of football players, BCOA and TMI accept this assumption for purposes of this brief. The important point from BCOA's and TMI's perspective is that, if indeed the NFL teams are separate employers that engage in multiemployer bargaining, then that multiemployer bargaining must be governed by the same federal laws and policies that govern in numerous other industries that bargain on a multiemployer basis, such as mining, transportation, construction, maritime, hotels, and retail food. In deciding this case, therefore, the Court should consider the history of multiemployer bargaining in this country, the federal labor laws and policies that have protected multiemployer bargaining groups from collateral attack under the antitrust laws, and the profound impact that a reversal of those policies in this case would have on longstanding bargaining relationships across industry lines.

In brief, the decision of the court of appeals should be affirmed because it is based on well-established principles of federal labor law and policy that have governed multiemployer bargaining for many decades. The National Labor Relations Act expresses our national policy that unbridled competition over the price of human toil has no place in American society. Federal labor policy actively supports collective bargaining "to eliminate competition over wages and working conditions." *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975). This policy would be completely undermined if a multiemployer bargaining association's efforts to standardize terms and conditions of employment for bargaining unit employees (such as the $1,000 per week salary in this case) were subject to the federal antitrust laws.

The right of employers unilaterally to implement terms and conditions of employment upon reaching an impasse after good-faith bargaining has been recognized under federal labor law for more than fifty years. Unilateral

implementation is a legitimate self-help measure available to employers under federal labor law to break an impasse. There is no principled reason why a multiemployer bargaining group should be denied the use of this lawful bargaining tactic, or subjected to antitrust exposure for engaging in self-help authorized by the labor laws.

The purpose of the nonstatutory labor exemption to the antitrust laws is to distinguish collective bargaining activities from antitrust restraints of trade and to enable the collective bargaining process to work. If the position advocated by petitioners or the government were adopted by the Court, multiemployer bargaining would come to a grinding halt. Union-sponsored antitrust litigation would become a "powerful new weapon" in collective bargaining. Unions would have a greater incentive to litigate than to negotiate. Subject to new antitrust exposure, and deprived of a traditional self-help remedy, employers simply would no longer agree to participate in multiemployer bargaining. Among other things, this would destabilize labor relations in many industries, jeopardize longstanding group benefit programs, and increase labor strife.

ARGUMENT

I. THIS CASE IS NOT CONFINED TO PROFESSIONAL SPORTS. IT AFFECTS LABOR-MANAGEMENT RELATIONS IN MANY BASIC INDUSTRIES THAT NEGOTIATE ON A MULTIEMPLOYER BASIS

Multiemployer bargaining in professional sports is subject to the same federal labor laws and policies that govern multiemployer bargaining in other industries. Therefore, to put this dispute in its proper context, the Court should consider the historical significance of multiemployer bargaining, its favored status under our national labor policy, why it has flourished in diverse industries such as coal and trucking, and how it benefits employers, employees, and the public at large.

Multiemployer bargaining has had an important place in labor-management relations in this country for more than 100 years. As this Court stated nearly forty years ago, "[m]ultiemployer bargaining long antedated the Wagner Act, both in industries like the garment industry, characterized by numerous employers of small work forces, and in industries like longshoring and building construction, where workers change employers from day to day or week to week." *NLRB v. Truck Drivers Local Union No. 449 ("Buffalo Linen")*, 353 U.S. 87, 94 (1957).

More recently, in another case arising in the multiemployer context, the Court cited a survey from the Bureau of Labor Statistics ("BLS") showing the prevalence of multiemployer bargaining at that time. Of major collective-bargaining agreements in 1980 (those covering 1,000 or more employees), 42% were multiemployer agreements. *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 410 n.4 (1982). A more recent (1994) BLS survey of major collective bargaining agreements (those covering 1,000 or more employees) showed that 44% were multiemployer agreements and that 2,305,478 employees were covered by those agreements. *See* U.S. Dept. of Labor, Bureau of Labor Statistics, Major Bargaining Units and Employment in Private Industry, by Type of Bargaining Unit (Feb. 14, 1996) (unpublished data).[1]

Although multiemployer bargaining is not expressly addressed in the National Labor Relations Act ("NLRA"), Congress, the National Labor Relations Board ("NLRB"), and this Court long have recognized that multiemployer bargaining not only is permitted under the NLRA, but enjoys a favored status under federal labor policy. As this Court stated in *Buffalo Linen*, the congressional debates on the Taft-Hartley Amendments to the NLRA in

[1] For the Court's convenience, BCOA and TMI have lodged a copy of this data with the Clerk of the Court.

1947 show that Congress rejected proposals to outlaw or limit multiemployer bargaining, and recognized that in many industries multiemployer bargaining is "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." 353 U.S. at 95-96.

Congress favored multiemployer bargaining for several reasons. Multiemployer bargaining enables small employers to bargain on a more equal footing with a large union. It helps unions and employers standardize wages. It prevents one employer from gaining a competitive advantage over another by lowering wages and benefits. It encourages employers to join together to develop industry-wide benefit programs that employers could not offer individually. *Bonanno Linen*, 454 U.S. at 409 n.3. And, as the NLRB has stated, multiemployer bargaining encourages both sides to adopt a flexible attitude during negotiations. "[E]mployers can make concessions 'without fear that other employers will refuse to make similar concessions to achieve a competitive advantage,' and a union can act similarly 'without fear that the employees will be dissatisfied at not receiving the same benefits which the union might win from other employers.'" *Id.* (quoting Brief for the NLRB at 10).

In the trucking industry, which includes hundreds of companies, large and small, multiemployer bargaining serves many of these beneficial purposes. Consistent with the underlying purpose of the federal labor laws, multiemployer bargaining takes wages and working conditions out of competition for a large segment of the industry. It enables scores of employers to bargain on an equal footing with the Teamsters, a large and powerful union. It has enabled hundreds of trucking companies to join together and create several of the largest health and retirement funds in the nation, providing health and pension benefits to hundreds of thousands of active and retired employees and their families. It has established a national

grievance system that resolves internally, without the involvement of the courts and without work stoppages, workplace disputes involving more than 100,000 Teamster-represented employees, including diverse issues such as subcontracting and the closing of terminals. Although always subject to improvement (like any collective bargaining agreement), the National Master Freight Agreement, in its 32-year history, has stabilized labor relations in the trucking industry and reduced labor strife.

Similarly, multiemployer bargaining has played an important role for employers, employees, and the public at large in the coal industry. Coal mining is distinguished in part by "[t]he continual discovery of new coal mines and exhaustion of old ones," which has led "to a very high turnover of employers" and substantial mobility of employees. *Connors v. Link Coal Co.*, 970 F.2d 902, 903 (D.C. Cir. 1992). Accordingly, since 1950, labor and management in the coal industry have negotiated through national, multiemployer bargaining agreements a health and retirement system that has provided "a means for assuring workers retirement benefits without linking specific workers to specific employers." *Id.* In other words, employees who worked for several different employers, and so-called "orphan" miners whose employers went out of business, have received health and pension benefits under this system for more than four decades. This industry-wide benefit program simply would not have been possible without multiemployer bargaining.

More recently, BCOA and the UMWA have negotiated other group benefit programs such as the UMWA-BCOA Training and Education Fund, which provides financial assistance for training or education of unemployed UMWA miners and their dependents, and the UMWA-BCOA Labor Management Positive Change Fund, which provides financial assistance for various programs to foster greater cooperation between labor and management in the coal industry.

In short, BCOA and TMI urge the Court not to lose sight of the fact that the resolution of this case will have repercussions far beyond the world of highly compensated professional athletes. The opinion of the court of appeals is grounded in fundamental principles of federal labor law and policy that affect multiemployer bargaining relationships covering millions of employees in numerous basic industries.

II. A MULTIEMPLOYER BARGAINING ASSOCIATION SHOULD NOT BE SUBJECT TO LIABILITY UNDER THE ANTITRUST LAWS FOR ENGAGING IN ECONOMIC SELF-HELP THAT HAS BEEN LAWFUL UNDER FEDERAL LAW FOR THE PAST FIFTY YEARS

The National Labor Relations Act, commonly known as the Wagner Act,[2] and the Labor-Management Relations Act, commonly known as the Taft-Hartley Act,[3] have established private collective bargaining as the regime governing relations between employers and their unionized employees. The basic legislative principles underlying these statutes are the preference for collective rather than individual bargaining, and the conviction that private parties should negotiate their own labor solutions, without government interference. *See, e.g., NLRB v. Insurance Agents' Int'l Union,* 361 U.S. 477, 488 (1960) ("Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences"); *J.I. Case Co. v. NLRB,* 321 U.S. 332, 337 (1944) ("Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act").

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[2] 49 Stat. 449 (1935) (codified as amended, 29 U.S.C. §§ 141-187 (1994)).

[3] 61 Stat. 136 (1947) (codified as amended, 29 U.S.C. §§ 141-187 (1994)).

To ensure a level playing field, Congress created in the NLRA a series of procedural rules to govern the entire collective bargaining process. These rules, for example, establish the "mutual obligation" of employers and unions to negotiate in good faith throughout the bargaining process (including periods after contract expiration and after impasse), and they define conduct that constitutes unfair labor practices by employers and unions. *See, e.g.*, NLRA §§ 8(a) and (b) (29 U.S.C. §§ 158(a) and (b)) (describing unfair labor practices by employers and labor organizations); NLRA § 8(d) (29 U.S.C. § 158(d)) (describing the "mutual obligation" of employers and labor organizations to bargain collectively).

In interpreting these provisions, the NLRB and the courts consistently have recognized that economic self-help by employers and unions is necessary, lawful, promotes collective bargaining, and strongly encourages the parties to reach collective bargaining agreements. *See, e.g., Insurance Agents' Int'l Union*, 361 U.S. at 489 ("The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized").

A union's economic self-help remedies, which it can use after contract expiration, include tactics such as picketing, strikes, whipsaw or selective strikes, and boycotts. A multiemployer group's collective self-help remedies include lockouts, the hiring of replacement workers, and implementation of terms and conditions of employment following impasse. *See Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22, 23 (1973), *enforcement denied on other grounds*, 500 F.2d 181 (5th Cir. 1974). It is well-established that the availability of self-help remedies continues following impasse, when either party "may increase economic pressure on one or both sides, and thus increase the desire for agreement." *Charles D. Bonanno Linen*

Service, Inc., 243 N.L.R.B. 1093, 1093-94 (1979), *enf'd*, 630 F.2d 25 (1st Cir. 1980), *aff'd*, 454 U.S. 404 (1982).[4]

The court of appeals in this case concluded, not surprisingly, that a multiemployer bargaining group's use of economic self-help after impasse (*i.e.*, the unilateral implementation of wage rates contained in the group's pre-impasse proposal), which has long been authorized under federal labor law, did not violate the antitrust laws. The court's decision was based on the nonstatutory labor exemption to the antitrust laws.

The nonstatutory labor exemption reflects judicial recognition that concerted activity in the context of multiemployer collective bargaining is regulated primarily by the more specific and later-enacted labor laws, rather than the antitrust laws. For decades, this Court and lower federal courts consistently have held that concerted economic self-help, in the various forms contemplated and approved by the labor laws, cannot provide the basis for an antitrust claim. As the Second Circuit recently observed,

> we find during the 104 succeeding years [after passage of the Sherman Act] not a single instance, prior to this very case, of a union or an individual employee asserting the stark claim that the routine practices of multiemployer bargaining violate the antitrust laws.

National Basketball Ass'n v. Williams, 45 F.3d 684, 689 (2d Cir. 1995), *cert. pending*, No. 95-137 (filed July 24, 1995).

The right of employers unilaterally to implement terms and conditions of employment after impasse has been

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[4] Although federal labor law permits a union to exercise all of its self-help remedies after contract expiration, an employer must wait until a good-faith impasse has been reached before it can unilaterally change a term or condition of employment. *See NLRB v. Katz*, 369 U.S. 736 (1962).

recognized under federal labor law for more than fifty years. *See, e.g., Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967) ("[A]fter bargaining to an impasse . . . an employer does not violate the [NLRA] by making unilateral changes that are reasonably contemplated within his pre-impasse proposals"), *pet. for review denied sub nom. American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968); *NLRB v. McClatchey Newspapers, Inc.*, 964 F.2d 1153, 1157 (D.C. Cir. 1992) (statement of Edwards, J.) (same); *Atlas Tack Corp.*, 226 N.L.R.B. 222, 227 (1976) (same), *enf'd without op.*, 559 F.2d 1201 (1st Cir. 1977); *American Laundry Machinery Co.*, 107 N.L.R.B. 1574, 1579 (1954) (same). *See also Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988) ("If the parties were indeed at an impasse, then the employer's statutory duty to maintain the status quo during postcontract negotiations would end") (citation omitted); *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) ("an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment") (citing *NLRB v. Katz*, 369 U.S. 736 (1962)). The NLRB recognized this right in its earliest days, even before Congress passed the Taft-Hartley Act in 1947. *See Westchester Newspapers, Inc.*, 26 N.L.R.B. 630, 642-43 (1940) (finding that an employer did not violate its duty to bargain in good faith by unilaterally changing the basis of employee pay where "the negotiations were in suspension" and the employer had "engaged in conferences and extended discussions with the Union with respect to the Union's demands, presented counterproposals, and made concessions").

This fundamental labor law right to implement terms and conditions of employment after impasse applies equally to employers negotiating on a multiemployer basis and to employers negotiating individually with unions. *See, e.g., Powell v. National Football League*, 930 F.2d

1293, 1303 n.10, 1304 (8th Cir. 1989) (holding that "the nonstatutory labor exemption extends beyond impasse" and permits multiemployer association to unilaterally impose prior terms of employment and new terms of employment), *cert. denied*, 498 U.S. 1040 (1991); *United Fire Proof Warehouse Co. v. NLRB*, 356 F.2d 494, 498-99 (7th Cir. 1966) (upholding a multiemployer bargaining group's unilateral implementation of a wage decrease following impasse). *See also Paramount Liquor Co.*, 307 N.L.R.B. 676, 686 (1992) (holding that employers, which had engaged in joint negotiations with the union, had lawfully implemented a wage reduction after impasse); *Salinas Valley Ford Sales, Inc.*, 279 N.L.R.B. 679, 690 (1986) (upholding employers' joint implementation of new wage scale provision that employees viewed as less favorable than previous wage scale).

No authority or case precedent holds that an employer's right to engage in economic self-help is diminished or lost when the employer decides to negotiate on a multiemployer basis. Indeed, since it is undisputed that a single employer may implement after impasse *and* that Congress sought to encourage multiemployer bargaining, it is difficult to discern what logic could lead to the conclusion that an industry choosing to proceed on a multiemployer basis could do so only by surrendering one of the fundamental self-help weapons that otherwise would be available to the group's members.

This Court and lower federal courts repeatedly have held that multiemployer bargaining groups may utilize the same economic weapons as employers negotiating on an individual basis. *See, e.g., Bonanno Linen*, 454 U.S. at 412 (right of multiemployer group to hold members in the group after impasse to maintain unit solidarity); *NLRB v. Brown*, 380 U.S. 278, 284-86 (1965) (right of multiemployer group to hire temporary workers to replace locked out employees); *Buffalo Linen*, 353 U.S. at 97 (right of multiemployer group to lockout employees

in response to a "whipsaw" strike); *Powell*, 930 F.2d at 1303 n.10, 1304 (right of multiemployer group to unilaterally impose prior terms of employment and new terms of employment after impasse); *United Fire Proof Warehouse*, 356 F.2d at 498-99 (right of multiemployer group to impose wage decrease following impasse). *See also Kennedy v. Long Island R.R.*, 319 F.2d 366, 372-73 (2d Cir.) (establishing a multiemployer strike insurance fund to combat a "whipsaw" strike does not violate the Railway Labor Act, the Sherman Act, or the Interstate Commerce Act), *cert. denied*, 375 U.S. 830 (1963).

The government argues in its brief that the nonstatutory exemption must end after impasse. *See* Brief of the United States and the Federal Trade Commission at 16-17. Judge Wald, in her dissenting opinion below, stated that impasse marks the point at which "the employer has exhausted its statutory duty to bargain." Pet. App. 52a (emphasis deleted). These remarkable and unprecedented positions regarding the role of impasse in labor relations are directly contrary to numerous NLRB decisions, the position that the government took before this Court in *Bonanno Linen*, and this Court's decision in that case.

Impasse does not mark the end of the bargaining process, nor does it terminate the employer's duty to bargain; rather, it is simply one point in the collective bargaining process, one stopping place along the road to a new collective bargaining agreement. For instance, in its seminal decision in *Hi-Way Billboards*, the NLRB described impasse as a time at which the parties "often resort to forms of economic persuasion to establish the primacy of their negotiating position." 206 N.L.R.B. at 23.

The Board, in its brief to this Court in *Bonanno Linen*, characterized a bargaining impasse as commonplace, stating that impasse is "part of the normal process of attempting to reach an agreement in collective bargaining." Brief

for the NLRB in *Bonanno Linen* (No. 80-931), at 21. The Court accepted the Board's characterization of impasse. "As a recurring feature in the bargaining process, impasse is only a temporary deadlock . . . 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'" *Bonanno Linen*, 454 U.S. at 412 (quoting *Charles D. Bonanno Linen Service, Inc.*, 243 N.L.R.B. 1093, 1093-94 (1979)).

Contrary to the views of Judge Wald and the United States as amicus curiae, impasse is simply a point in the collective bargaining process where parties retreat from face-to-face negotiations and attempt to strengthen their bargaining position through the use of economic weapons such as strikes, boycotts, lockouts, and unilateral implementation. *See* Brief for the NLRB in *Bonanno Linen* at 22 (quoting the Board's decision in *Bonanno Linen* to the effect that impasse "may provide time for reflection and a cooling of tempers . . . demonstrate the depth of a party's commitment to a position taken in the bargaining [or] . . . increase economic pressure on one or both sides, and thus increase desire for agreement"); *see also id.* at 21-22 ("Despite the existence of an impasse, a sense of the inevitability of eventual settlement underlies almost all collective bargaining negotiations").

In light of the above, there is no principled or logical basis for subjecting multiemployer bargaining groups to liability under the antitrust laws for collectively implementing terms and conditions of employment for bargaining unit employees once they reach a "temporary deadlock" in their negotiations. The central purpose of the nonstatutory labor exemption is to permit the collective bargaining process to work. So long as the collective bargaining process is continuing, the labor exemption is necessary. Without the labor exemption, the essence of multiemployer collective bargaining (*i.e.*, collective activity by employers that otherwise are competitors in the marketplace) would be banned by the antitrust laws.

For this reason, this Court and the federal courts of appeals consistently have applied the nonstatutory labor exemption to protect multiemployer bargaining groups from liability under the antitrust laws for conduct (including economic self-help) authorized under the labor laws. *See, e.g., Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965) (plurality opinion) (holding that multiemployer agreement restricting hours of work was protected by nonstatutory labor exemption because "the national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work"); *Williams*, 45 F.3d at 689 (nonstatutory labor exemption protected multiemployer group's collective imposition of prior employment terms after contract expiration); *Powell*, 930 F.2d at 1303 n.10, 1304 (nonstatutory exemption protected multiemployer group's collective imposition of both prior and new terms of employment after impasse); *Clune v. Publishers' Ass'n of New York City*, 214 F. Supp. 520 (S.D.N.Y.) (rejecting union antitrust action to challenge multiemployer group lockout in response to a selective strike), *aff'd*, 314 F.2d 343 (2d Cir. 1968). *See also Amalgamated Meat Cutters v. Wetterau Foods*, 597 F.2d 133, 136 (8th Cir. 1979) (applying nonstatutory labor exemption to defeat union antitrust action challenging alleged conspiracy to obtain and employ replacement workers during strike); *Kennedy*, 319 F.2d at 372-73 (rejecting union effort to use antitrust laws to stop multiemployer group from creating strike insurance fund to combat union "whipsawing tactics").

As all of these cases hold, the nonstatutory labor exemption protects a multiemployer bargaining group from antitrust liability whenever the group is engaging in concerted activity (including economic self-help) authorized by the labor laws and directed toward the labor market involved in collective bargaining. That

is not to say, however, that multiemployer bargaining associations have blanket immunity from the antitrust laws. As this Court has held, the nonstatutory exemption does not apply where restrictive labor provisions have been directed against employers outside the bargaining unit. *See, e.g., Connell Constr. Co.*, 421 U.S. at 625-26 (refusing to apply exemption to an agreement between general contractors and a union that directly excluded nonunion subcontractors from a portion of the market); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965) (holding that nonstatutory exemption does not protect union-employer agreement to impose union wage scale on employers outside the multiemployer unit).

This case, by contrast, raises none of the legitimate antitrust concerns identified by the Court in *Connell* and *Pennington*. Unlike the activity in *Connell* and *Pennington*, which was directed against employers outside the multiemployer bargaining unit, the concerted activity at issue here (*i.e.*, the setting of wages for bargaining unit employees) is confined to the labor market involved in collective bargaining. Moreover, the alleged "restraint" (*i.e.*, uniform wage rates) is plainly a mandatory subject of bargaining that affects only the labor market and not the product market.

In effect, petitioners and the government challenge the multiemployer bargaining process itself. This case involves a frontal assault on the kind of conduct that is at the very core of multiemployer bargaining, collective activity by a multiemployer group directed toward the negotiation of terms and conditions of employment for bargaining unit employees. If members of a multiemployer bargaining group are subject to antitrust liability when they join together after contract expiration, or after impasse, to exert economic pressure on a union to achieve an acceptable collective bargaining agreement, then the nonstatutory labor exemption is devoid of meaning. If the nonstatutory labor exemption does not pro-

tect the multiemployer collective activity involved in this case, which is confined to a mandatory subject of bargaining in the bargaining unit, then multiemployer collective bargaining as it has been known for years simply will not work.

III. THE POSITION ADVOCATED BY PETITIONERS AND THE GOVERNMENT WOULD OPEN THE FLOODGATES OF UNION-SPONSORED ANTITRUST LITIGATION, PROLONG LABOR DISPUTES, AND ULTIMATELY DESTROY MULTIEMPLOYER BARGAINING

According to petitioners, the nonstatutory labor exemption from the antitrust laws should expire (and multiemployer bargaining groups should be subject to antitrust liability) upon expiration of a collective bargaining agreement. The government disagrees, arguing instead that the nonstatutory labor exemption should expire once the parties reach impasse in their collective bargaining negotiations. Neither position makes any sense.

BCOA has negotiated on a multiemployer basis in the coal industry for more than 45 years. TMI and its predecessor have negotiated on a multiemployer basis in the trucking industry for more than 30 years. This extensive experience in negotiating with major and aggressive national unions leads to the inescapable conclusion that the positions advanced by petitioners and the government, if adopted by this Court, would (1) thrust antitrust courts into traditional collective bargaining disputes, (2) expose employers to antitrust liability and financial ruin for collective actions routinely taken in multiemployer bargaining, and (3) ultimately destroy multiemployer bargaining.

The fact that petitioners and the government do not agree on when the exemption supposedly "expires" is telling. It shows that their positions are arbitrary, without logical support, and uncoupled from the rationale underlying the nonstatutory labor exemption. Neither position

is based on judicial precedent, and neither position comports with federal labor policy. There is no principled basis for the proposed expiration dates that petitioners and the government would foist on the Court.

Even the government recognizes the folly of petitioners' position. Antitrust immunity cannot end at the expiration of a collective bargaining agreement. After the expiration of a collective bargaining agreement, there is a statutory obligation under Section 8(d) of the NLRA for a multiemployer bargaining group to preserve the status quo by continuing mandatory subjects of bargaining. If the nonstatutory exemption ended at this point, employers would be in an impossible position. If the employers continued the terms and conditions of employment after contract expiration, they would be subject to treble damages under the antitrust laws. If the employers unilaterally changed the terms and conditions of employment after contract expiration, they would violate Section 8(d) of the NLRA. *See* Brief of the United States and the Federal Trade Commission at 16.

Moreover, petitioners' position that multiemployer bargaining groups should be subject to antitrust liability for engaging in collective self-help after contract expiration collides head-on with two decisions of this Court. If petitioners are suggesting that these cases should be overruled, they have not articulated any rationale to support their position.

In *Buffalo Linen*, the Court, in a unanimous decision, upheld a multiemployer bargaining group's lockout of union employees after the collective bargaining agreement had expired and the union had engaged in a selective or "whipsaw" strike. In affirming the legality of the employers' collective bargaining pressure, the Court acknowledged the strong federal labor policy favoring multiemployer bargaining and stated that it would not "deny self-help by employers when legitimate interests of employees and employers collide." 353 U.S. at 96.

Similarly, in *NLRB v. Brown*, 380 U.S. 278 (1965), the Court upheld a multiemployer bargaining group's decision to lockout bargaining unit employees and hire temporary replacement workers after the expiration of the collective bargaining agreement. In affirming the legality of the employers' agreement to assert collective pressure on the union, the Court expressly recognized that this activity was important for the employers to sustain "the common front essential to multiemployer bargaining." *Id.* at 284. Each of these cases approved multiemployer self-help after contract expiration, and each fatally undercuts petitioners' position.

If the nonstatutory exemption ends when the collective bargaining agreement expires, employers will be wary about continuing to enforce, after expiration, *any* provision of a collective bargaining agreement that could raise antitrust issues. If, as petitioners contend in this case, the establishment of a uniform weekly salary is subject to antitrust scrutiny, then countless other provisions in collective bargaining agreements could be challenged as well, such as shift differentials, holiday pay, clothing allowances, sickness and accident benefits, and the rate at which employers contribute to health and retirement funds.

If employers fear the prospect of antitrust litigation arising out of provisions that affect only bargaining unit employees, employers surely will be reluctant to continue enforcing so-called "work preservation" provisions that primarily affect bargaining unit employees, but secondarily affect other employers outside the bargaining unit. These provisions likely would be attacked under the antitrust laws not by unions, which demand such protection, but by the employers that are adversely affected by them.

Ironically, this would put in jeopardy the very kinds of restrictive subcontracting provisions that unions have fought hard to preserve under Section 8(e) of the NLRA. *See* 29 U.S.C. § 158(e); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 645 (1967) (upholding a col-

lective bargaining agreement that prohibited general contractors from using premade doors in lieu of doors fitted on the worksite by union members); *NLRB v. International Longshoremen's Ass'n*, 473 U.S. 61, 76-77 (1985) (upholding a collective bargaining agreement that reserved to union members most work loading and removing containers from ships that departed from or were destined to ports within a certain geographic area). Employers that enforce such union-sponsored restrictions to the detriment of other employers after the expiration of a collective bargaining agreement would risk antitrust litigation and treble damages.[5]

Nor could an employer avoid liability by withdrawing from the multiemployer group after contract expiration, or after impasse. Once multiemployer bargaining commences, employer withdrawal is permitted only under "unusual circumstances," *Retail Associates, Inc.*, 120 N.L.R.B. 388, 395 (1958), and neither contract expiration nor impasse is sufficient. *See, e.g., Bonanno Linen*, 454 U.S. at 412 ("permitting withdrawal at impasse would as a practical matter undermine the utility of multiemployer bargaining").

The consequences of antitrust liability beginning at impasse, as urged by the government, are equally foreboding to employers. As Chief Judge Edwards aptly noted in this case:

> Injecting the Sherman Act into the collective bargaining process would disrupt this balance by giving

[5] The threat of antitrust exposure also would apply to any unilateral changes in work preservation agreements after impasse. For example, if employers after bargaining to impasse unilaterally changed the ILA's "Rules on Containers" from a 50-mile restriction to a five-mile restriction, that action clearly would be subject to antitrust scrutiny under petitioners' and the government's position, even though it would result in less of a restraint on competition than the existing provision. *See International Longshoremen's Ass'n*, 473 U.S. at 61-67 (explaining "Rules on Containers" and the 50-mile restriction).

> unions a powerful new weapon, one not contemplated by the federal labor laws. With such a weapon at their disposal, union workers could do what the plaintiff class has done here: invoke the antitrust laws and their threat of treble damages to gain an advantage in bargaining over a salary provision about which union members do not care deeply enough to strike.

Pet. App. 20a.

The dissent below, and the government in its brief to this Court, somehow conclude that permitting such antitrust suits would simultaneously further the purposes of collective bargaining and advance the competition interests protected by the antitrust laws. It would have the opposite effect.

One need look no further than the recent history of collective bargaining in professional sports to see the adverse impact such a system would have on collective bargaining. Instead of settling disputes at the bargaining table through the use of economic weapons authorized by Congress, unions in professional sports repeatedly have used the federal courts in an attempt to resolve their differences. Many such cases are chronicled in the briefs of amici curiae in support of petitioners, including briefs filed on behalf of the unions in professional football, basketball, baseball, and hockey. That cannot be the labor relations model for the rest of American industry.

If the antitrust exemption were to end at impasse, unions would have an incentive to develop unreasonable bargaining proposals and to harden their bargaining positions. Instead of promoting labor peace, such a system would promote antitrust litigation. There would be lengthy disputes as to whether the parties were at "impasse," depositions would take the place of negotiating sessions, and federal courts would be in the middle of it all, serving as labor arbitrators in judicial robes. This, of course, is

totally contrary to federal labor policy, which is designed to promote private resolution of labor disputes without intervention by the government.

Stripping employers of their labor exemption at impasse also makes no sense under the rationale of this Court in *Bonanno Linen*. There, in refusing to allow an employer to withdraw from a multiemployer bargaining group after impasse, the Court recognized the need for employer solidarity at such a critical point in the collective bargaining process. The Court refused to allow the union, at impasse, to fragment the multiemployer group and destroy the integrity of the multiemployer bargaining unit. In this case, the Court should be guided by the same principles and refuse to permit the threat of antitrust litigation to "undermine the utility of multiemployer bargaining." *Bonanno Linen*, 454 U.S. at 412.

More fundamentally, there is no reason why employers engaged in multiemployer bargaining should be denied the use of self-help measures that are available to individual employers at impasse in their negotiations. As discussed in Part II of this brief, an employer's ability unilaterally to implement terms and conditions of employment at impasse has been recognized under federal labor law for more than fifty years. Neither the NLRB or any court has ever held that a multiemployer bargaining group cannot hold this economic weapon in reserve, or use it as necessary to break an impasse.

Finally, if multiemployer bargaining groups are deprived of self-help measures available to individual employers, and are exposed to financial ruin through years of antitrust litigation for doing precisely what they were established to do, the employer members of such groups simply will no longer bargain on a multiemployer basis. Under federal labor law, multiemployer bargaining is voluntary and consensual. *See, e.g., Joseph J. Callier*, 243 N.L.R.B. 1114, 1117 (1979) (stating that the essence of

multiemployer bargaining is a consensual relationship and "an unequivocal intention to be bound in collective bargaining by group rather than individual action"), *enf'd in part*, 630 F.2d 595 (8th Cir. 1980). If employers do not find it beneficial to engage in multiemployer bargaining, they will refuse to do so. It is an unfair labor practice under § 8(b)(1)(B) of the NLRA for a union to coerce an employer to bargain on a multiemployer basis. *See, e.g., NLRB v. Amax Coal Co.*, 453 U.S. 322, 334-35 (1981) ("Congress enacted § 8(b)(1)(B) . . . to prevent unions from forcing employers to join multiemployer bargaining units"). If employers in multiemployer bargaining units are deprived of legitimate economic weapons and subject to antitrust exposure, as proposed by petitioners and the government, they will be forced to abandon multiemployer bargaining, dismantle group benefit programs, and fend for themselves in individual collective bargaining negotiations. This result offends, rather than supports, federal labor policy.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

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ANTONY BROWN, ET AL., PETITIONERS,

v.

PRO FOOTBALL, INC., D/B/A WASHINGTON REDSKINS, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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OTHER AUTHORITIES

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-388

ANTONY BROWN, ET AL., PETITIONERS,

v.

PRO FOOTBALL, INC., D/B/A WASHINGTON REDSKINS, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

American Trucking Associations, Inc. ("ATA"), a not-for-profit corporation, is a trade association consisting of motor carriers, state trucking associations, and national trucking conferences. Its membership includes more than 4,500 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents more than 35,000 member companies and every type and class of motor carrier operation in the United States.

ATA was created to promote and protect the interests of the trucking industry. It regularly appears in this Court and other courts to present the views of the trucking industry. ATA submitted a brief as *amicus curiae* in the seminal multiemployer bargaining case of *NLRB* v. *Truck Drivers Local No. 449* (*"Buffalo Linen"*), 353 U.S. 87 (1957), and has been involved as *amicus* in labor law and other cases in this Court. See, *e.g., ABF Freight Sys., Inc.* v. *NLRB*, 114 S. Ct. 835 (1994).

A number of unionized motor carrier members of ATA collectively bargain with their employees' union through multiemployer bargaining units pursuant to the National Labor Relations Act. The largest multiemployer unit in the trucking industry consists of 24 less-than-truckload motor carriers whose collective bargaining agreement covers approximately 120,000 workers. Another large multiemployer unit includes 17 automobile transport companies with approximately 12,000 employees. See also *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 713 n.20 (1965) (opinion of Goldberg, J.) ("trucking" is one of the "important industries" where multiemployer bargaining occurs).

Although individual trucking companies may have different reasons for participating in multiemployer bargaining units, one prevalent reason is to counter the bargaining strength of the International Brotherhood of Teamsters, a union of 1.8 million members that represents the majority of employees in the unionized segment of the trucking industry. See *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 454 U.S. 404, 409 n.3 (1982) ("'[m]ultiemployer bargaining * * * enables smaller employers to bargain "on an equal basis with a large union"'") (citations

omitted). Unlike professional sports franchises and leagues such as respondents in this case, which have special needs for uniformity in collective bargaining, trucking companies have considerable business discretion in selecting the appropriate mode of bargaining and may join or withdraw from multiemployer bargaining units based on the relative advantages and disadvantages of those alternatives.

ATA has a strong interest in the outcome of this case. A number of its members currently engage in multiemployer bargaining. Moreover, the decision whether or not to participate in multiemployer bargaining is based on the competing advantages and disadvantages of such bargaining units, including the potential antitrust risks that multiemployer bargaining entails. Accordingly, ATA's members are directly affected by the decision below on the scope of the nonstatutory labor exemption to the antitrust laws in the context of multiemployer bargaining, and in particular whether a multiemployer bargaining unit's imposition of terms of employment at impasse in the collective bargaining process is subject to Section 1 of the Sherman Act. In addition, because employers may have different reasons and enjoy greater flexibility in deciding whether to join a multiemployer bargaining unit in the trucking industry than in a professional sports league, ATA's participation as *amicus curiae* will give the Court a broader perspective on the important legal question presented in this case. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

A multiemployer bargaining unit's imposition of terms at impasse is an integral part of the collective

bargaining process under the National Labor Relations Act. Federal labor law governs both the propriety of employer conduct at impasse and the operations of multiemployer bargaining units, and it clearly covers the challenged activity in this case. Petitioners' attempt to apply the rules and remedies of the antitrust laws to that conduct is irreconcilable with the established system of federal labor law and, if accepted by this Court, would seriously impair national labor policy.

Petitioners have advanced no reason to subject such collective bargaining activity to antitrust scrutiny. Contrary to their argument for a narrow construction, this Court has recognized that the nonstatutory labor exemption is "a broad * * * exemption from the antitrust laws" (*Associated General Contractors* v. *California State Council of Carpenters*, 459 U.S. 519, 539 (1983)), and in no event should it be narrower than is appropriate to effectuate its purposes.

Petitioners also are incorrect that the exemption is restricted to collective bargaining agreements themselves. This argument ignores the elemental principle that the NLRA protects the collective bargaining *process*. Nor does impasse mark the termination of the process; rather, it is simply a temporary suspension of negotiations that typically is overcome, and it represents a critical phase in the strategic and economic contest between management and labor. Finally, exclusion of this collective bargaining conduct from the exemption would pose enormous practical difficulties and would improperly disrupt collective bargaining and discourage multiemployer units.

Accordingly, a multiemployer bargaining unit's use of the self-help weapon of imposing terms at impasse is part and parcel of the collective bargaining process under the NLRA and falls squarely within the nonstatutory labor exemption.

ARGUMENT

A MULTIEMPLOYER BARGAINING UNIT'S IMPOSITION OF TERMS AT IMPASSE IN THE COLLECTIVE BARGAINING PROCESS IS PROTECTED BY THE NONSTATUTORY LABOR EXEMPTION TO THE ANTITRUST LAWS.

I. THE LAWFULNESS OF A MULTIEMPLOYER BARGAINING UNIT'S IMPOSITION OF TERMS AT IMPASSE IS GOVERNED BY FEDERAL LABOR LAW AND IS NOT SUBJECT TO THE ANTITRUST LAWS.

At issue in this case is conduct that is an integral part of the collective bargaining process: a multiemployer bargaining unit's imposition of terms and conditions of employment in response to an impasse in bargaining with the union. Nevertheless, petitioners, supported by the federal antitrust enforcement authorities, seek to have courts and juries scrutinize that conduct under the antitrust laws and to impose treble damages on the members of the multiemployer unit for collective actions taken in the course of the bargaining process. As the court below correctly concluded, interjection of antitrust rules and remedies into the collective bargaining process in that way would impair the policies of the federal labor laws and would be irreconcilable with the fundamental

principles underlying the nonstatutory labor exemption that this Court has recognized for half a century.[1]

The nonstatutory labor exemption reflects "a proper accommodation between the congressional policy favoring collective bargaining under the [National Labor Relations Act] and the congressional policy favoring free competition in business markets [under the antitrust laws]." *Connell Constr. Co.* v. *Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 622 (1975). The exemption thus serves to "harmoniz[e] the Sherman Act with the national policy expressed in the National Labor Relations Act." *United Mine Workers* v. *Pennington*, 381 U.S. 657, 665 (1965). This "harmon[y]" between the federal labor and antitrust laws requires that the labor exemption encompass the imposition of terms by a multiemployer bargaining unit at impasse.[2]

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[1] As the court of appeals explained, and as is undisputed in this Court, the multiemployer conduct challenged here was "lawful under the labor laws," and "primarily affect[s] only a labor market" and "has no anti-competitive effect on the product market." Pet. App. 10a, 16a. Accordingly, this case is not controlled by the Court's previous decisions holding that the nonstatutory labor exemption does not apply to employer-employee activities that are outside the proper scope of the labor laws and restrain competition in a product market. See, *e.g.*, *Connell Constr. Co.* v. *Plumbers & Steamfitters Local No. 100*, 421 U.S. 616 (1975); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); compare *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965) (upholding nonstatutory labor exemption).

[2] We note that the most recent cases on this issue in the courts of appeals, which have involved a wide array of judges (including several well known for their expertise in labor and antitrust law), have all agreed that the nonstatutory labor exemption applies to the activities of multiemployer bargaining units in the collective bargaining process. See, *e.g.*, Pet. App. 3a (Edwards, C.J., joined by Randolph, J.); *National Basketball Ass'n* v. *Williams*, 45 F.3d 684 (2d

1. It is clear that federal labor law regulates a multiemployer bargaining unit's imposition of terms of employment at impasse in collective bargaining. Multiemployer bargaining units are well established under the federal labor laws and play an important role in collective bargaining. As this Court explained in *NLRB* v. *Truck Drivers Local No. 449* (*"Buffalo Linen"*), 353 U.S. 87, 94-95 (1957):

> Multi-employer bargaining long antedated the Wagner Act * * *.
>
> [In enacting the Taft-Hartley amendments,] Congress refused to interfere with such bargaining because there was cogent evidence that in many industries the multi-employer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining.

The Court has recognized the many interests of both employers and employees that multiemployer bargaining serves:

> "Multiemployer bargaining offers advantages to both management and labor. It enables smaller employers to bargain 'on an equal basis with a large union' and avoid 'the competitive disadvantages resulting from non-uniform contractual terms.' At the

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Cir. 1995) (Winter, J., joined by Pratt & Calabresi, JJ.), petition for cert. pending, No. 95-137 (filed July 24, 1995); *Powell* v. *National Football League*, 930 F.2d 1293 (8th Cir. 1989) (John R. Gibson, J., joined by Wollman, J.), cert. denied, 498 U.S. 1040 (1991).

> same time, it facilitates the development of industry-wide, worker benefit programs that employers otherwise might be unable to provide. More generally, multiemployer bargaining encourages both sides to adopt a flexible attitude during negotiations; as the Board explains, employers can make concessions 'without fear that other employers will refuse to make similar concessions to achieve a competitive advantage,' and a union can act similarly 'without fear that the employees will be dissatisfied at not receiving the same benefits which the union might win from other employers.' Finally, by permitting the union and employers to concentrate their bargaining resources on the negotiation of a single contract, multiemployer bargaining enhances the efficiency and effectiveness of the collective bargaining process and thereby reduces industrial strife."

Charles D. Bonanno Linen Service, Inc. v. *NLRB*, 454 U.S. 404, 409-410 n.3 (1982) (citations omitted). As the *amicus* filings in the present case attest, "[m]ultiemployer bargaining * * * continue[s] to be the preferred bargaining mechanism in many industries." *Id.* at 410.

With respect to the issue in this case, the subject of impasse in collective bargaining negotiations raises a host of significant and recurring labor law questions. Such questions include both the definition of impasse and the types of employer conduct at impasse that are consistent with labor policy. See, *e.g.*, *NLRB* v. *Katz*, 369 U.S. 736, 745 (1962) (employer's imposition, at impasse,

of terms offered to but rejected by union during negotiations is not an unfair labor practice); *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 318 (1965) (employer's lockout of employees at impasse is not an unfair labor practice); *Bonanno Linen*, 454 U.S. at 412 (definition of impasse). As the cited cases illustrate, these and many other matters concerning impasse are to be resolved under the National Labor Relations Act.

Likewise, federal labor law governs the existence and operation of multiemployer bargaining units. For instance, the labor laws determine the appropriateness of and conditions for multiemployer bargaining, the circumstances in which an employer is allowed to withdraw from the unit, and the propriety of specific multiemployer conduct during the collective bargaining process. See *Buffalo Linen*, *supra* (multiemployer lockout in response to union strike is not an unfair labor practice); *Bonanno Linen*, *supra* (impasse does not justify employer's withdrawal from multiemployer unit, but employer can negotiate individual interim agreement with union); *id.* at 412 (NLRB has accepted multiemployer bargaining "as an instrument of labor peace"); Robert A. Gorman, LABOR LAW 86-89 (1976) (discussing NLRB certification of multiemployer bargaining units).

Nearly forty years ago, this Court anticipated that "inevitable questions concerning multi-employer bargaining [are] bound to arise in the future" (*Buffalo Linen*, 353 U.S. at 96), and multiemployer bargaining has in fact "raised a variety of problems requiring resolution." *Bonanno Linen*, 454 U.S. at 410. Such issues "Congress * * * 'intended to leave to the Board's specialized judgment.'" *Buffalo Linen*, 353 U.S. at 96 (citation omitted).

> The ultimate problem is the balancing of the conflicting legitimate interests [of employers and employees]. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.

Ibid. Under that approach, "the ground rules for multiemployer bargaining * * * have evolved and are still evolving, as the Board, employing its expertise in the light of experience, has sought to balance the 'conflicting legitimate interests' in pursuit of the 'national [labor] policy * * *.'" *Bonanno Linen*, 454 U.S. at 413 (citations omitted). The assessment of "the significance of impasse and the dynamics of collective bargaining" (*ibid.*), in order to promote "the stability of multiemployer units" and avoid "undermin[ing] the utility of multiemployer bargaining" (*id.* at 410, 412), "is precisely the kind of judgment that *Buffalo Linen* ruled should be left to the Board." *Id.* at 413.

Significantly, petitioners and the federal antitrust authorities nowhere contend that a multiemployer bargaining unit's imposition of terms at impasse is not covered by the National Labor Relations Act. Indeed, it is settled law under the Act that an individual employer's right to "institute unilaterally * * * working conditions" at impasse is one of the "tools of economic self-help" available in collective bargaining. *American Ship Bldg. Co.*, 380 U.S. at 316. See also, *e.g.*, *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 675 (1981) ("employer * * * may bargain to impasse * * * and use the economic weapons at [its] disposal to attempt to secure [its] aims"). Federal labor law is no less

applicable to such imposition of terms by a multiemployer bargaining unit.[3]

2. The foregoing analysis makes clear that the lawfulness of a multiemployer bargaining unit's imposition of terms upon impasse critically implicates national labor policy and should be judged under the federal labor laws. To superimpose antitrust processes, rules, and remedies on those applicable under the NLRA, as petitioners urge, would strike at the very heart of the system of labor law and intolerably intrude upon the collective bargaining process.

First of all, under the federal labor laws, "Congress * * * created the National Labor Relations Board to supervise the collective-bargaining process * * * [and] see that the process worked." *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 103 (1970). Congress thus "entrusted * * * [the] administration and development [of national labor law] to a centralized, expert agency" utilizing "'specially designed procedures * * * to obtain uniform[ity]." *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 286, 287 (1971). Petitioners, by contrast, would turn over the formulation and application of rules governing multiemployer bargaining to federal courts and juries sitting in individual antitrust suits across the country. By ignoring this Court's admonition that "'[a] multiplicity of tribunals and a diversity of procedures

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[3] Lower courts have not distinguished under federal labor law between the rights of individual employers and those of multiple employers. See, *e.g.*, *Amalgamated Meat Cutters Union Local No. 576* v. *Wetterau Foods, Inc.*, 597 F.2d 133, 135-136 (8th Cir. 1979); *Kennedy* v. *Long Island R.R.*, 319 F.2d 366, 371-372 (2d Cir.), cert. denied, 375 U.S. 830 (1963).

are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law,'" petitioners' approach improperly "sacrifice[s] important federal interests in a uniform law of labor relations centrally administered by an expert agency." *Id.* at 287, 291 (citation omitted); see also *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971).

In addition to different tribunals and procedures, petitioners' proposal also would wrench multiemployer bargaining from its moorings in labor law and create a body of substantive rules that bear no relationship to federal labor policies. Under the NLRA, the principles governing multiemployer bargaining are designed to "effectuate national labor policy" (*Buffalo Linen*, 353 U.S. at 96) "in the light of experience" (*Bonanno Linen*, 454 U.S. at 413) based on such practical considerations as "the stability of multiemployer units" and "the dynamics of collective bargaining." *Id.* at 410, 413. Antitrust courts and juries, on the other hand, are guided solely by the principle of economic competition under the often malleable standard of unreasonable restraints of trade. Application of competition-based standards would take no account of the labor law interest in multiemployer bargaining and predictably would forbid collective bargaining activity that the labor laws now permit, *e.g.*, multiemployer lockouts (*Buffalo Linen, supra*) and perhaps the very existence of multiemployer bargaining itself (*Buffalo Linen, supra*; *Pennington*, 381 U.S. at 664). The detriment to national labor policy is manifest.

Lastly, petitioners would substitute the antitrust regime of treble damages (as well as costs and attorneys' fees) for the labor law's remedial scheme of NLRB orders to cease and desist from unfair labor

practices and bargain in good faith. As this Court has recognized, however, "the range and nature of those remedies that are and are not available is a fundamental part and parcel of the operative legal system established by the National Labor Relations Act." *Lockridge*, 403 U.S. at 287. See also *id.* at 288-289 n.5 (emphasizing importance of limitations on NLRA's "remedial aspects"). Petitioners' invocation of antitrust remedies would upset the careful remedial balance struck by Congress in the labor laws.[4]

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[4] Notwithstanding petitioners' assertion (Pet. Br. 32), *Connell* is not to the contrary. That case involved conduct that *violated* the labor laws. See 421 U.S. at 634 (conduct was "illegal" under the NLRA); *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 85 (1982). Moreover, the portion of the opinion relied upon by petitioners followed the Court's conclusion that the nonstatutory labor exemption did not apply, and therefore it has no bearing on the issue presented here. Finally, the Court's conclusion that antitrust remedies could be employed in addition to labor law remedies in that case was tied to the particular provision at issue there and is not of general application. See *Connell Constr. Co.*, 421 U.S. at 634 ("[T]he question [is] whether Congress meant to preclude antitrust suits based on the 'hot cargo' agreements that it outlawed in 1959. There is no legislative history * * * suggesting that labor-law remedies for § 8(e) violations were intended to be exclusive, or that Congress thought allowing antitrust remedies in cases like the present one would be inconsistent with the remedial scheme of the NLRA"); see also *id.* at 636 n.17 ("in cases like this one, * * * an independent federal remedy [under the antitrust laws] * * * is consistent with the NLRA"). The courts of appeals have understood this part of *Connell* to be narrowly limited. See, *e.g.*, *Richards* v. *Neilsen Freight Lines*, 810 F.2d 898, 906 (9th Cir. 1987) (Kennedy, J.) ("*Connell* does not suggest that every violation of section 158(e) gives rise to an antitrust suit. It is not paradoxical that a labor law violation may still be within the antitrust exemption, for the violation will carry its own remedies under the labor laws"); *Prepmore Apparel, Inc.* v. *Amalgamated Clothing Workers*, 431 F.2d 1004, 1007 (5th Cir. 1970) (conduct that violated

Accordingly, a multiemployer bargaining unit's imposition of terms at impasse is a matter properly left to federal labor law and, under the nonstatutory labor exemption, is not subject to the Sherman Act. The antitrust laws should not be used to take away the economic weapons available to employers in collective bargaining under the NLRA. See *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608, 614-618 (1986); *Lodge 76, International Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 144-148, 153 (1976); see also *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 111 (1989).

II. PETITIONERS HAVE OFFERED NO JUSTIFICATION FOR APPLYING THE SHERMAN ACT IN THIS CASE.

Petitioners and the federal antitrust enforcement authorities do not really take issue with these basic principles. Rather, they assert various grounds why the nonstatutory labor exemption should be inapplicable in this case. None of the reasons they offer, however, justifies the application of the antitrust laws to what is quintessentially a labor law issue.[5]

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the NLRA was exempt from the Sherman Act), cert. dismissed, 404 U.S. 801 (1971).

[5] The government's brief presents the views of the Department of Justice and the Federal Trade Commission but was not filed on behalf of the National Labor Relations Board. In a footnote to the conclusion of its brief, the government cryptically observes that the Board disagrees with the court of appeals' "expansive formulation" of the nonstatutory labor exemption. U.S. Am. Br. 27 n.10. Of course, "this Court reviews judgments, not opinions."

A. The Doctrine Of Narrow Construction Does Not Justify Application Of The Sherman Act.

The principal argument of both petitioners and the government is that exemptions from the antitrust laws should be narrowly construed. However, this Court has recognized that "[f]ederal policy has * * * developed * * * a *broad* labor exemption from the antitrust laws" to reflect the "separate body of labor law specifically designed" to govern employer-employee relations. *Associated General Contractors*, 459 U.S. at 539-540 & n.43 (emphasis added) (citing nonstatutory labor exemption). See also 1 Phillip Areeda & Donald F. Turner, ANTITRUST LAW ¶ 229a at 189 (1978) ("the bulk of labor activities * * * are exempt from the antitrust laws"). Moreover, as the government itself acknowledges (U.S. Am. Br. 16), the general maxim of narrow construction must be tempered by the recognition that, where "both [the Sherman Act and the National Labor Relations Act] cannot be given full effect, * * * the antitrust laws should yield to the more specific, and later enacted, obligations of the NLRA." Finally, the canon of narrow construction of antitrust exemptions is offset here by the equally well-settled canon that the National Labor Relations Act should be given a "liberal statutory construction" and exceptions to it are to be "narrowly construed." 3A Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 73.01 at 319 (5th ed. 1992).

Although exemptions from the antitrust laws should not be needlessly overbroad, they must be

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Chevron U.S.A. Inc. v. *Natural Resources Defense Council*, 467 U.S. 837, 842 (1984).

broad enough to accomplish the purpose of the exemption. As this brief demonstrates, application of the antitrust laws here would be inconsistent with the rationale of the nonstatutory labor exemption. What petitioners and the government propose is not an appropriately focused exemption but an unduly grudging one that frustrates rather than furthers the policies of the exemption. In fact, their approach would call into question the legality of multiemployer bargaining at all. But see *Pennington*, 381 U.S. at 664 ("[w]e think it [is] beyond question" that multiemployer bargaining is not a violation of the Sherman Act).

B. The Nonstatutory Labor Exemption Protects The Collective Bargaining Process And Is Not Confined To Collective Bargaining Agreements.

Petitioners construct an argument that the nonstatutory labor exemption is confined to collective bargaining agreements and therefore does not extend to any allegedly anticompetitive activity outside the agreement itself. All petitioners succeed in establishing, however, is the unexceptionable proposition that the exemption covers such agreements. Nothing in either law or logic supports petitioners' more sweeping assertion that the exemption is *limited* to collective bargaining agreements and applies *only* to those agreements.

Petitioners' argument overlooks the fundamental precept of federal labor law that the NLRA governs and protects the collective bargaining *process*. As this Court repeatedly has explained, "[s]ince 1935 the story of labor relations in this country

has largely been a history of governmental regulation of the process of collective bargaining." *H.K. Porter Co.*, 397 U.S. at 102. Accordingly, "[t]he NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 753 (1985). See also, *e.g.*, *American Ship Bldg. Co.*, 380 U.S. at 317 (the "central purpose" of the NLRA was to protect "the process of collective bargaining"); *First National Maintenance Corp.*, 452 U.S. at 674 (the NLRA proscribes "conduct by unions and employers that * * * [is] deleterious to the [collective bargaining] process"); *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 20 (1987) ("the NLRA is concerned with ensuring an equitable bargaining process, not with the substantive terms that may emerge from such bargaining"). Petitioners' constricted view of the labor exemption is irreconcilable with this settled understanding of federal labor policy.

Nor does impasse represent the termination of the collective bargaining process. "As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken.' * * * Hence, 'there is little warrant for regarding an impasse as a rupture of the bargaining relation.'" *Bonanno Linen*, 454 U.S. at 412 (citations omitted). In fact, as the government points out (U.S. Am. Br. 24), "impasse could occur more than once within the course of a single labor dispute." Moreover, impasse reflects the parties' bargaining strategies and is an occasion for each party to employ the economic weapons at its disposal to induce the other side to accept its bargaining proposals. Thus, "an impasse may be

'brought about intentionally by one or both parties as a device to further * * * the bargaining process,'" and it often is the "'application of economic force'" that breaks an impasse. *Bonanno Linen*, 454 U.S. at 412 (citations omitted); see also *First National Maintenance Corp.*, 452 U.S. at 675. Like other economic weapons available to employers, such as shutdowns and lockouts, a multiemployer bargaining unit's imposition of terms at impasse is an integral part of the ongoing collective bargaining process.[6]

Although they seek to restrict the nonstatutory labor exemption to collective bargaining agreements, petitioners ultimately are forced to concede (Pet. Br. 40) that the exemption extends to such actions as lockouts that are not part of any agreement. This concession is necessary to accommodate the decisions of this Court holding that lockouts are not an unfair labor practice and that their use by multiemployer bargaining units falls within the nonstatutory labor exemption. See *American Ship Building Co., supra; Buffalo Linen, supra.* At the same time, however, it is fatally inconsistent with their central submission that the exemption protects only collective bargaining agreements and not

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[6] This is a complete answer to Judge Wald's dissent below (Pet. App. 51a-58a). In particular, although the unilateral imposition of terms at impasse does temporarily set the substantive conditions of employment during the period until agreement is reached, that does not make it any the less an economic tool that is part of the bargaining process. In this regard, it is no different from a lockout, which is an accepted practice under the labor laws, and which, even if engaged in by a multiemployer bargaining unit, is within the labor exemption. See *Buffalo Linen, supra*, and *American Ship Building Co., supra*. There simply is no basis, either in law or in the practicalities of the collective bargaining process, for Judge Wald's attempted distinction between "terms" and "tactics."

other actions that occur as part of the collective bargaining process.

Petitioners equally fail in their attempt (Pet. Br. 18-30) to predicate the nonstatutory labor exemption on the theory that the employees consent to the multiemployers' allegedly anticompetitive conduct when they sign a collective bargaining agreement. Once again, that argument does not explain such concerted activities as multiemployer lockouts that are protected by the exemption but are not embodied in the eventual agreement. More fundamentally, the exemption does not rest on the notion of employees' assent to anticompetitive practices or waiver of their rights under the antitrust laws. Rather, as the Court has explained, it reflects sound legal principles that "harmoniz[e]" (*Pennington*, 381 U.S. at 665) and "accommodat[e]" (*Connell*, 421 U.S. at 622) the labor and antitrust laws. Petitioners' "consent" argument is made from whole cloth and, other than the proffered virtue of being exceedingly narrow (but see pages 15-16, *supra*), finds no support in the decisions of this Court.[7]

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[7] Contrary to petitioners' assertion (Pet. Br. 22), it is not the case that "most lower courts" have limited the nonstatutory labor exemption to collective bargaining agreements consented to by a union. See pages 6-7 note 2, *supra*.; see also, *e.g.*, *Neilsen Freight Lines*, 810 F.2d at 905 (Kennedy, J.) (holding that "concerted action * * * was protected [by the exemption] although it was outside the context of a collective bargaining relation"); *Amalgamated Meat Cutters*, 597 F.2d at 136; *Long Island R.R.*, 319 F.2d at 372-373. Indeed, under petitioners' view, *Connell* would have been an easy case, and the Court's extensive analysis would have been unnecessary, because it was undisputed that the challenged conduct was not part of a collective bargaining agreement. See 421 U.S. at 625-626, 636; *Neilsen Freight Lines*, 810 F.2d at 905.

Finally, petitioners assert (Pet. Br. 29-30, 34-37, 47) that an employer's imposition of terms at impasse is not part of the collective bargaining process — or indeed of federal labor law — because it arises under state common law. In their view, it merely represents the employer's right to conduct its business as it wishes, including the right to set terms and conditions of employment, in the absence of a collective bargaining agreement. This novel and startling proposition is utterly unfounded (and, we note, is not advanced by the government).

It simply is untenable to suggest that states are free to eliminate the employer's accepted right to impose terms at impasse and thereby upset the fundamental and longstanding balance that federal law has established between the parties in collective bargaining negotiations. Contrary to petitioners' theory, this Court and the NLRB have recognized that the employer "has been given" by federal labor law various "weapons to counterbalance the employees' power of strike," including the "tool[ ] of economic self-help" to "institute unilaterally * * * working conditions [at impasse]." *American Ship Bldg. Co.*, 380 U.S. at 316.[8]

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8 *Fort Halifax*, the authority upon which petitioners rely for this proposition (Pet. Br. 34-35), is not to the contrary. There, in the course of holding that a state's requirement of severance payments to employees of closed plants was not preempted by the NLRA, the Court observed that

> [a]bsent a collective-bargaining agreement, * * * state common law generally permits an employer to run the workplace as it wishes. * * * The parties may enter negotiations designed to alter this state of affairs, but, if impasse is reached, the employer may rely on pre-existing state law to justify its authority to make employment decisions.

What is more, federal labor law exhaustively regulates this area of employer-employee relations. It defines the pivotal concept of impasse (*Bonanno Linen*, 454 U.S. at 412); it precludes employers from unilaterally changing the status quo, even after the expiration of the collective bargaining agreement, until impasse has been reached (*Katz, supra*); it requires that the terms unilaterally imposed after impasse be limited to those proposed to the union during negotiations

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482 U.S. at 21. Read in context and against the backdrop of established federal labor law, this passage simply means that the substantive employment terms an employer may set are a function of state law; an employer cannot pay wages or provide working conditions that are made illegal under the state's police power. See *Metropolitan Life Ins. Co.*, 471 U.S. at 755 (employers cannot "exempt themselves" from state law). But the employer's right unilaterally to impose terms at impasse in collective bargaining negotiations under the NLRA is a federal right, even though the particular terms the employer can impose in the exercise of that federal right are constrained by state law. In other words, the question whether an employer can unilaterally impose terms at impasse is a matter of federal law and is separate from and precedent to the question whether the specific substantive terms it sets are legal as a matter of state law. Although petitioners boldly assert that *Fort Halifax* "negates the Court of Appeals' logic" and fault the majority below for "not even mention[ing] the case" (Pet. Br. 37), the court was correct that the case is essentially irrelevant, and indeed it is not even cited by the government.

This distinction between the federal right to impose unilateral terms at impasse as part of the collective bargaining process, and the state law right to set a particular substantive term, also disposes of petitioners' reliance (Pet. Br. 28-30, 34-37) on *Metropolitan Life Ins. Co., supra*, and *Livadas* v. *Bradshaw*, 114 S. Ct. 2068 (1994). For the same reason, petitioners' discussion of the difference between the "bargaining process" and the "end result of bargaining" in *Metropolitan Life* (Pet. Br. 35-36) gets the Court's decision exactly backwards.

(*NLRB* v. *Crompton-Highland Mills*, 337 U.S. 217, 223-225 (1949); *Katz*, 369 U.S. at 745 & n.12; *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988)); and it determines whether an employer can withdraw from a multiemployer bargaining unit at impasse and whether it can negotiate individual agreements with the union for the interim period of impasse (*Bonanno Linen, supra*). There is no basis to carve out from this web of federal labor law regulation the single issue — and the most fundamental issue — of the employer's imposition of terms at impasse and to commit that question exclusively to the province of state law.[9]

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9 Although the government also emphasizes the application of the nonstatutory labor exemption to collective bargaining agreements, it does not frame the theory of the exemption, as petitioners do, in terms of employee consent or state common law. Rather, it argues that the exemption is limited to "duties" and "obligations" that labor law "requires" of employers (U.S. Am. Br. 17-19); absent such requirements, "[e]mployers are * * * able to comply with both the labor laws and the antitrust laws, and should so comply. * * * After impasse, nothing in employers' specific legal obligations established by the NLRA conflicts with the antitrust laws' prohibition against combinations in restraint of trade." *Id.* at 17, 19; see also *id.* at 23-24. As the government acknowledges (*id.* at 19), this is a reformulation of its "narrow construction" argument, which, as already discussed, is unavailing. Moreover, the government's theory finds no support in the text or reasoning of this Court's decisions. And most importantly, it fails to explain the right of a multiemployer bargaining unit to engage in a post-impasse lockout (since that is not "required" by federal labor law) and thus is inconsistent with *Buffalo Linen*. Indeed, multiemployer bargaining itself is not a "duty" or "obligation" under the NLRA and therefore would appear, contrary to *Pennington* (381 U.S. at 664), to be subject to the antitrust laws under the government's theory. In the end, the government's virtually monolithic focus on the policy of competition would improperly invoke the antitrust laws to

C. Petitioners' Position Would Be Unworkable In Practice And Would Both Distort The Collective Bargaining Process And Deter Multiemployer Bargaining Units.

Petitioners seek (Pet. Br. 40) to reassure the Court that their position leaves adequate alternatives available to employers and would not upset the process of collective bargaining. These assurances are misplaced and provide cold comfort to employers that must deal with the practical implications of the Court's decision. Contrary to petitioners' submission, their position would be unworkable in practice and would both distort the collective bargaining process and deter multiemployer bargaining units.

According to petitioners, each employer in a multiemployer bargaining unit can, at impasse, individually decide "unilaterally to implement its own preferred employment terms *without fear of antitrust liability*, since it is only the *collusive* imposition of restraints that runs afoul of the Sherman Act." Pet. Br. 40 (emphases in original).[10] In reality, employers will

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remove important economic weapons and bargaining strategies that the labor laws allow to employers.

[10] Petitioners also suggest (Pet. Br. 40) that some collectively imposed terms would be upheld under the Rule of Reason if they do not constitute an "unreasonable" restraint of trade. Whatever the applicability of the Rule of Reason in the context of sports leagues — and both petitioners and the government merely note that possibility but conspicuously decline to commit themselves to that position — it would not appear to be applicable in most other industries, where under traditional principles a collective

have two likely choices: either to continue the terms of the now-expired collective bargaining agreement that the multiemployer unit previously accepted, or to impose the terms the multiemployer unit unsuccessfully proposed to the union during negotiations. These were, after all, the terms that commended themselves to at least a majority of the employers, and it can be expected that most if not all of the employers would adhere to them even in the exercise of their individual judgment.

But either course is fraught with antitrust peril. Both alternatives have their origin in a collective agreement among employers in the multiemployer bargaining unit (in either the prior collective bargaining agreement or the negotiating proposals during the current bargaining process). Under petitioners' position, the nonstatutory labor exemption for those concerted activities would lapse upon the expiration of the collective bargaining agreement and the occurrence of impasse in the negotiations. Accordingly, a decision by the employers to impose terms previously set on a collective basis, even if now made by each employer individually, is a virtual invitation for the employees to hale them into court in an antitrust suit. Indeed, petitioners ominously warn of their view (Pet. Br. 30) that "the salaries * * * the clubs may impose upon impasse * * * may not start from a level that is collusively fixed by the clubs in a unilateral effort to eliminate competitive market forces."

It is far from clear whether an employer's individual decision to impose a term previously

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agreement among competitors to set the price they pay for goods or services would be a per se violation of the Sherman Act.

reached through concerted action is, as a legal matter, sufficient to withdraw from the collective agreement and establish independent conduct outside the scope of the Sherman Act. But even apart from that, the parallel decisions of the employers to impose previously agreed-upon terms could readily be alleged as a claim of concerted activity under the antitrust laws and could well necessitate discovery and be enough to get past summary judgment and require submission to a jury at trial. Worse yet, employers in a multiemployer unit will engage in continuing discussions and exchanges of information with each other in the course of the ongoing bargaining process; their post-impasse participation in the multiemployer bargaining process thus will be used as evidence of collusion among individual employers that will provide additional fodder for an antitrust plaintiff. Petitioners therefore present employers in a multiemployer unit with a Hobson's choice: whatever they do, they are likely to find themselves enmeshed in a burdensome and protracted antitrust case, and to face the prospect of treble damages and attorneys' fees, for conduct that, petitioners assure the Court (Pet. Br. 40), may be undertaken "without fear."[11]

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11 These risks are of particular concern because of the substantial burdens of antitrust litigation and the drastic nature of the antitrust remedy of treble damages and attorneys' fees. See, *e.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 344-345 (1979) (noting that antitrust suits "add a significant burden to the already crowded dockets of the federal courts," "impose a heavy litigation burden," saddle defendants with the substantial "cost of defending * * * [such] actions," and pose a danger of "frivolous claims brought to extort nuisance settlements"); *id.* at 345 (Rehnquist, J., concurring) (expressing concern that antitrust suits "'add a substantial volume of litigation to the already strained dockets of the federal courts and could be used to exact unfair settlements from [defendants]'");

This outcome is fundamentally unfair to employers in multiemployer bargaining units. Such unfairness is exacerbated by the fact that the existence of an impasse is not always clear. See *Laborers Health & Welfare Trust Fund*, 484 U.S. at 543 n.5 ("'[i]mpasse is an imprecise term of art'" and "'its application can be difficult'"). If employers erroneously conclude that no impasse has been reached and thus collectively maintain the status quo as the NLRA requires (see *Katz*, *supra*), they will be subject to treble damages.

For the same reason, petitioners' proposal would skew the collective bargaining process. Because of this threat of treble damages liability for collective activity after impasse, employers would have a strong incentive to err on the side of concluding that impasse has occurred. Such premature suspension of negotiations would be inimical to the most basic labor law policies.

Mitsubishi Motors v. *Soler Chrysler-Plymouth*, 473 U.S. 614, 633 (1985) (observing that horizontal antitrust claims "often occasion the monstrous proceedings that have given antitrust litigation an image of intractability"); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 266 (1972) (the remedy of treble damages and attorneys' fees "should provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits"); 10 Julian O. von Kalinowski, ANTITRUST LAWS AND TRADE REGULATION § 115.01[1] at 115-3 (1995) (treble damages are a "severe sanction"); E. Compton Timberlake, FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS § 3.02 at 13 (1965) ("[G]iving threefold the damage sustained is a drastic remedy * * *. [M]any unfounded actions are brought in the hope that the cost of defending, plus the possible penalty of having to pay treble damages and attorneys' fees, will bring about a settlement"). This case is illustrative: the litigation lasted some four years in the district court and resulted in an award of treble damages of more than $30 million and attorneys' fees of $1.7 million. See Pet. App. 8a-9a.

Petitioners' proposal would further distort the collective bargaining process by giving employees a new and potent economic weapon to use against employers. See *Williams*, 45 F.3d at 689 (for more than 100 years after enactment of the Sherman Act, the practices of multiemployer bargaining units were never challenged). Indeed, employees can strategically utilize antitrust litigation in the midst of collective bargaining whenever — and however often — impasse occurs. See pages 17-18, *supra*.

Perhaps most importantly, petitioners' theory would improperly deter multiemployer bargaining units. In many industries that have multiemployer bargaining, including trucking, employers have considerable latitude to decide, as a matter of business judgment, whether to engage in multiemployer bargaining. In some circumstances, in fact, multiemployer bargaining advances the interests of employees, *e.g.*, by "'facilitat[ing] the development of industry-wide, worker benefit programs.'" *Bonanno Linen*, 454 U.S. at 409 n.3 (citation omitted). Confronted with the virtual certainty of antitrust litigation and potential treble damages liability if (as commonly happens) impasse is reached, prudent employers could well elect to forgo multiemployer bargaining in favor of individual negotiations. Such a forseeable consequence of petitioners' argument could be contrary in some situations to the best interests of employees (*ibid.*), impair "'the efficiency and effectiveness of the collective bargaining process'" (*id.* at 410 n.3), and discourage the use of a multiemployer bargaining process that has proven "in many industries * * * [to be] a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *Buffalo Linen*, 353 U.S. at 95.

Based on these concerns about the effect of their position on the collective bargaining process, petitioners complain (Pet. Br. 31) that the decision below rests on an impermissible "judicial desire to adjust the balance of power between employees and employers." The court of appeals, however, expressly disclaimed any such ruling. See Pet. App. 31a.

Moreover, for the reasons explained above, the court of appeals' holding is justified by considerations of national labor policy, and in particular by the recognized interest in promoting multiemployer bargaining, and not by an unfettered policy judgment to favor one party or the other in collective bargaining by providing additional economic weapons to strengthen that side's bargaining position. The Court's explanation of this distinction in *Bonanno Linen* is equally apt here (454 U.S. at 418-419):

> [T]he National Labor Relations Act does not constitute the Board as an "arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands" * * * or give "the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power." * * * But the Board has refused to enter that proscribed area * * *. Instead, it looked at its statutory mandate and duty — to promote labor peace through strengthened collective bargaining * * *.
>
> * * * [T]he Board in this case has developed a rule which, although it may

> deny * * * a particular economic weapon, does so in the interest of the proper and pre-eminent goal, maintaining the stability of the multiemployer unit.

The unbroken line of multiemployer bargaining cases back to *Buffalo Linen* demonstrates that this is a legitimate concern of federal labor law and, under the nonstatutory labor exemption, is a proper basis to exempt from the antitrust laws the multiemployer action challenged here. Consistent with the basic approach of the labor laws, the court of appeals properly refrained from injecting itself, in the guise of the Sherman Act, into the bargaining relationship and economic contest between employers and unions.[12]

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12 Petitioners also object (Pet. Br. 42) that the court of appeals has forced employees to waive their labor law rights in order to preserve their claims under the Sherman Act. However, as the court correctly observed (Pet. App. 24a), "the inception of a collective bargaining relationship between employers and employees irrevocably alters the governing legal regime." The employees' election to bargain collectively gives them a variety of important rights but, as the nonstatutory labor exemption recognizes, also requires that the conflicting policies of the labor laws and the antitrust laws be reconciled. Thus, the decision below simply reflects the fact that if employees are not unionized, the labor exemption is inapplicable, and accordingly the Sherman Act remains in full force.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANTHONY BROWN, *et al.*,

Petitioners,

v.

PRO FOOTBALL, INC. d/b/a WASHINGTON REDSKINS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF ON THE MERITS FOR CARRIERS CONTAINER COUNCIL, INC., NEW YORK SHIPPING ASSOCIATION, INC., and PACIFIC MARITIME ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Cases **Page(s)**

Council of North Atlantic Shipping Associations v. FMC, 672 F.2d 171 (D.C. Cir.), *cert. denied*, 459 U.S. 830 (1982) 20n

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Cases **Page(s)**

Powell v. National Football League ("Powell II"), 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991) 28n

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29 U.S.C. § 179 (1994) 25n

29 U.S.C. § 180 (1994) 25n

46 U.S.C. app. § 1702 (1988) 20n

46 U.S.C. app. § 1704 (1988) 20n

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29 C.F.R. § 102.60 (1995) 22n

29 C.F.R. § 102.61 (1995) 22n

29 C.F.R. § 102.63 (1995) 22n

James M. Altman, *Antitrust: A New Tool For Organized Labor?*, 131 U. PA.L.REV. 127 (1982) 16

Archibald Cox, *Labor and the Antitrust Laws: A Preliminary Analysis,* 104 U.PA.L.REV. 252 (1955) 8

NLRB CASEHANDLING MANUAL, pt. 2 (1989) 22n

Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints,* 75 GEO.L.J. 19 (1986) 8n

JONATHAN SWIFT, GULLIVER'S TRAVELS (1726), *reprinted in* THE COMPLETE WORKS OF JONATHAN SWIFT (Roslyn, New York: Black's Readers Service, 1932) 27

No. 95-388

In The

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OCTOBER TERM, 1995

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v.

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Respondents.

On Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

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BRIEF ON THE MERITS FOR CARRIERS CONTAINER COUNCIL, INC., NEW YORK SHIPPING ASSOCIATION, INC., AND PACIFIC MARITIME ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Introduction

The United States Court of Appeals for the District of Columbia Circuit ruled that the labor exemption immunizes from antitrust challenge a professional football league's multiemployer bargaining group's unilateral implementation of a uniform salary scale for developmental squad players that had been offered by the employer group during collective bargaining negotiations but

firmly rejected by the players' union. The court of appeals ruled that the labor exemption shields from antitrust liability this post-impasse implementation of employment terms in the labor market that is lawful collective bargaining activity under federal labor law, does not extend beyond the immediate bargaining unit, and has no undue impact on the product market. This rule of decision preserves the integrity and continued vitality of multi-employer bargaining, shelters from disruption long-standing rights established by well-settled principles of national labor law, and promotes the will of Congress by properly harmonizing the policies embodied in federal antitrust and federal labor legislation. The circuit court's definition of the scope of the labor exemption should be sustained.

Interest of the *Amici Curiae*

Carriers Container Council, Inc. ("CCC"), New York Shipping Association, Inc. ("NYSA"), and Pacific Maritime Association ("PMA") are non-profit membership associations which are the principal management, multiemployer collective bargaining representatives for employers of longshore workers in the United States. CCC and NYSA represent longshore employers on the Atlantic and Gulf Coasts, while PMA is the exclusive collective bargaining representative for longshore employers on the West Coast of the United States.

CCC is an association of the major United States and foreign vessel ocean carriers serving United States Atlantic and Gulf ports in connection with the transportation of goods by sea in international trade and commerce. CCC's 32 members during the past calendar year transported to and from United States Atlantic and Gulf ports more than 34.5 million tons of containerized cargo in the foreign trades of the United States. This cargo volume amounts to 82% of all containerized cargo loaded and unloaded at United States Atlantic and Gulf ports.

NYSA and PMA are associations of ocean carriers, marine terminal operators, stevedores, carrier agents, and other maritime concerns. NYSA's 71 members handle virtually all of the general cargo shipped through the Port of New York and New Jersey — the preeminent port on the East Coast of the United States. About 100 members of PMA are involved in the handling of the approximately 200 million revenue tons of cargo entering or exiting ports on the Nation's Pacific Coast in the States of California, Oregon, and Washington.

The mission of all three associations is to represent their members in collective bargaining with the labor unions that represent American dockworkers. CCC and NYSA negotiate and administer labor agreements reached with the International Longshoremen's Association, AFL-CIO ("ILA") — the labor organization that represents longshore workers employed on the Atlantic and Gulf Coasts. PMA negotiates and administers labor agreements reached with the International Longshoremen's and Warehousemen's Union ("ILWU"), the labor representative for longshore employees on the West Coast.

CCC is the lead negotiator in master contract negotiations involving Atlantic and Gulf ports from Maine to Texas. This master contract establishes the terms and conditions of employment for tens of thousands of American longshore workers on the Nation's Eastern and Southern shores. NYSA, while also participating with CCC in master contract negotiations, is the exclusive negotiator for the local terms and conditions of employment which apply in the bistate Port of New York and New Jersey. PMA is the exclusive employer bargaining representative for the negotiation and administration of labor contracts establishing the terms and conditions of employment for longshore employees on the West Coast.

Collective bargaining in the longshore industry has traditionally been conducted on a multiemployer basis. On the Atlantic and Gulf Coasts labor contracts establishing the terms and

conditions of employment for ILA-represented longshore workers have been two-tiered. CCC and NYSA, in conjunction with a dozen other multiemployer bargaining associations and major longshore employers, negotiate a master contract fixing wages, container royalties, hours, term of contract, and certain other master terms on a uniform, coastwide basis from Maine to Texas. Other employment issues, such as pension and welfare benefits, holidays, vacations, seniority, work rules, manning, safety, hiring rules, etc., which are referred to as local conditions, are negotiated by NYSA and other multiemployer bargaining associations on an individual-port basis. Historically, on the West Coast a single coastwide bargaining unit encompassing all ports has prevailed. PMA is the exclusive bargaining representative for longshore employers in this coastwide unit. On the Pacific Coast one uniform, multiemployer labor contract negotiated between PMA and the ILWU prescribes all of the terms and conditions of employment as well as a complete system of fringe benefits for ILWU-represented longshore employees. The CCC, NYSA, and PMA multiemployer bargaining units each fixes the employment terms for thousands of American dockworkers employed by hundreds of different employers.

Along with the labor unions with which they bargain CCC, NYSA, PMA, and other multiemployer bargaining associations throughout the United States are the intended beneficiaries of the protections afforded by the labor exemption to the antitrust laws in the context of multiemployer collective bargaining. The *amici* joining in this brief thus have a vital and compelling interest in the issues now before the Court concerning the appropriate parameters of the labor exemption.[1] There is no indication in either the lower courts' decisions in this case or in the pleadings and briefs submitted to this Court that the rule of decision in this case will be confined to collective bargaining in professional sports. CCC's, NYSA's, and PMA's participation as *amici*

[1] All parties have consented to the filing of this *amici curiae* brief. Their written consents have been lodged with the Clerk of the Court.

curiae will assure that this Court's determination of the scope of the labor exemption will not be unduly influenced by the peculiar characteristics of multiemployer bargaining in specialized industries, like professional sports, but will be informed by a consideration of the features of more traditional multiemployer bargaining units in the Nation's industrial sector.

Summary of Argument

Federal labor legislation effectuates the national policy of promoting the resolution of labor disputes through a process of private collective bargaining. Congress has chosen a labor law scheme that gets labor and management to the bargaining table and then leaves them alone to work out their differences, allowing each to resort to whatever economic pressure devices are available. This national labor policy applies to both single employer and multiemployer collective bargaining units without distinction.

To promote Congress's deliberate choice of negotiation, not litigation, for the settlement of collective bargaining disputes, federal antitrust law regulation of collective bargaining has been displaced by a labor exemption derived from both the express provisions of federal labor statutes as well as from the logical, nonstatutory extension of the national policy embodied in the entire regime of federal labor law. The statutory exemption prescribed in the Clayton and Norris-LaGuardia Acts shields from antitrust challenge certain protected activities engaged in by persons participating or interested in labor disputes, which would include not only labor unions but also employers. The explicit language of both of these statutes includes in the list of protected activities exempt from the antitrust laws the very collective bargaining activities challenged in this case — the post-impasse, unilateral implementation of employment terms by a multiemployer collective bargaining group.

The inclusion in the statutory exemption of conduct ordinarily engaged in by multiemployer groups to resolve collective bargaining and other labor disputes also defines the contours of the nonstatutory labor exemption — the necessary tool for the proper accommodation between the congressional policy favoring collective bargaining and the congressional policy favoring free competition in business markets.

The nonstatutory labor exemption extends not only to the collective bargaining agreement itself but also to legitimate unilateral multiemployer collective bargaining activities required or permitted by federal labor law. The consent of unit employees or their union representative is not an essential prerequisite for application of the labor exemption. Both multiemployer bargaining and the employer-employee relationship are consensual in nature. By agreeing to a multiemployer bargaining format the employees and their union representative agree to accept whatever rights and privileges federal labor law bestows on the multiemployer group, including the right to implement employment terms unilaterally after impasse. These post-impasse employment terms are not unilaterally imposed, since they are subject to the employees' acceptance. By continuing to work, the employees and their union manifest their acceptance of the employers' offer, and a contract results that fixes the terms of employment on an interim basis until the collective bargaining process produces a final agreement. In a strike-free or lockout-free environment a contract is always in place, signifying the employees' and their union's consent to the post-impasse employment terms offered by their employers.

Collective bargaining activities of multiemployer groups that are lawful under federal labor law and that affect only employment conditions in the immediate bargaining unit are exempt under both the statutory and nonstatutory labor exemptions from challenge under the antitrust laws at all stages of the collective bargaining process. This rule of law properly promotes national

labor policy without frustrating national antitrust policy, since employment conditions involving only the immediate bargaining unit do not affect the employers' business market, the area of antitrust concern. Allowing antitrust law challenges to multiemployer collective bargaining activities would interfere with the rights and privileges bestowed by national labor law, fragment multiemployer units, promote union intransigence in the collective bargaining process, and destabilize the bargaining authority of both union and multiemployer bargaining representatives. Inviting antitrust laws to the bargaining table would sound the death knell for multiemployer bargaining in the United States.

ARGUMENT

Multiemployer Collective Bargaining Activities Lawful Under Federal Labor Law And Affecting Only The Immediate Bargaining Unit's Employment Relationship Are Shielded From Antitrust Law By The Labor Exemption

Petitioners on behalf of that segment of the professional football players' bargaining unit composed of practice squad players urge a drastic pruning of the labor exemption that could expose to liability under the antitrust laws multiemployer collective bargaining activities that are lawful under, and may sometimes be compelled by, federal labor law.[2] The plain and explicit terms both of the labor exemption contained in the Clayton and Norris-LaGuardia Acts and of the so called "nonstatutory labor exemption" emanating from those statutory schemes as well as from the subsequently enacted Wagner and Taft-Hartley Acts

[2] The United States, as *amicus* in support of petitioners, would not go as far as petitioners in limiting the labor exemption. However, its proposal to end the exemption at or just after impasse would also have severe adverse consequences for multiemployer bargaining groups.

reveal a deliberate and unambiguous congressional design favoring federal labor law as the exclusive regulatory calculus for adjudging the legality of collective bargaining activities and discouraging the interjection of antitrust law by either side into the collective bargaining process.

Antitrust Policy

From the enactment of the Nation's first antitrust statute, the Sherman Act of 1890, it was evident that collective bargaining activities do not fall within the target area of antitrust concern.[3] Congress sought to stamp out only restraints "upon commercial competition in the marketing of goods or services." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940) (footnote omitted). The Sherman Act is a "consumer welfare prescription," *see Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979),[4] that sets its sights on competitive conditions in business markets, not on the terms and conditions of employment in labor markets. *See* Archibald Cox, *Labor and the Antitrust Laws — A Preliminary Analysis*, 104 U. PA. L. REV. 252, 255 (1955) ("[T]he antitrust laws are not concerned with competition among laborers or with bargains over the price or supply of labor — its compensation or hours of service or the selection and tenure of employees."). "[A] union, in its capacity as bargaining representative, will frequently not be part of the class the

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[3] The antitrust challenge in this case is predicated upon the proscriptions of § 1 of the Sherman Act, which states simply that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1994).

[4] Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L. J. 19, 45 (1986) ("Congress in 1890 was hostile toward giant trusts and corporations [, but] [t]his hostility, however, was not primarily directed at the 'aggregations of capital' because of their conduct as employers; rather it was in their capacity as exploiters of the consumer and small competitors that they incurred the brunt of congressional wrath.").

Sherman Act was designed to protect, especially in disputes with employers with whom it bargains." *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 540 (1983). Congress established a separate body of national labor law to regulate activities within labor markets. *See id.* at 539-40.

Labor Policy

Federal labor legislation is designed to effectuate a national policy of governmental neutrality and equality of bargaining power in the collective bargaining arena. The 1935 National Labor Relations Act ("Wagner Act") as amended by the 1947 Labor-Management Relations Act ("Taft-Hartley Act") (hereinafter collectively referred to as the "NLRA") establishes a comprehensive array of labor law standards to govern union and employer conduct and "deliberately plac[es] the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body [the National Labor Relations Board ("NLRB")] rather than the federalized judicial system." *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 288 (1971).[5]

In collective bargaining federal labor law makes no effort to dictate the substantive terms of the parties' agreement. Instead,

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[5] The Taft-Hartley Act removed the disparities of the earlier Wagner Act, which had held employers, but not unions, accountable for unfair labor practices. *Schnuck Markets, Inc. v. NLRB*, 961 F.2d 700, 703 n.7 (8th Cir. 1992) ("[W]hile the stated purpose of the Wagner Act . . . was intended to promote unionization, the Taft-Hartley Act attempted to restore some balance to labor management relations"); *Children's Habilitation Center, Inc. v. NLRB*, 887 F.2d 130, 131 (7th Cir. 1989) ("[T]he Taft-Hartley Act . . . sought to correct what had come to be thought of as the Wagner Act's excessive tilt towards unions"); *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1465 (7th Cir. 1983) ("The Wagner Act was of course intended to promote unionization . . . . Taft-Hartley applied some brakes, so that the balance of power between companies and unions would not shift wholly to the union side").

it establishes the "mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C.§158(d) (1994). The failure to bargain in good faith by either side at any stage of the negotiations, even after impasse, is an unfair labor practice, *see* 29 U.S.C. §§ 158(a)(5), 158(b)(3) (1994), but the failure to agree is not, *see* 29 U.S.C. § 158(d) (1994).

This legislated neutrality reflects the congressional policy of governmental non-interference in the collective bargaining process — get the parties to the table but then leave them alone to work out their differences, allowing each side to resort to whatever economic pressure devices are available. *NLRB v. Insurance Agents' Int'l Union,* 361 U.S. 477, 488-89 (1960); *see also Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132, 141 (1976); *First Nat'l Maintenance Corp. v. NLRB,* 452 U.S. 666, 678 (1981). Negotiation, not litigation, is Congress's chosen instrument for the settlement of collective bargaining disputes. *Fibreboard Paper Prods. Corp. v. NLRB,* 379 U.S. 203, 211 (1964).

The NLRA carefully calibrates the rights and duties of both parties to the bargaining process to effectuate the second congressional objective of a rough balance of power. Employees may strike, *see NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 14 (1962); 29 U.S.C. §163 (1994), but employers also have the right to lock out their workers, *see American Ship Bldg. Co. v. NLRB,* 380 U.S. 300, 310-11 (1965). After the prior labor contract expires and while negotiations are in progress, an employer may not undermine the union's bargaining authority by unilaterally changing any of the terms and conditions of employment in the expired contract that qualify as mandatory subjects of bargaining, *see NLRB v. Katz,* 369 U.S. 736, 743 (1962), but when an impasse occurs, an employer then has two choices: either lock out the employees or offer them new terms of

employment so long as these new terms are "reasonably comprehended within his pre-impasse proposals," *see, e.g., Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988).[6] Generally, economic strikers may not be fired and must be rehired when the strike ends, *see NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967), subject, however, to the employer's business necessity to hire permanent replacements, *see NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938). In administering the rights and duties of the bargaining parties, the NLRB's role under the NLRA is "to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970).

National labor law makes no distinction between single employer and multiemployer collective bargaining rights and obligations. Multiemployer bargaining is protected and encouraged under the Norris-LaGuardia Act, which precludes any injunction prohibiting employers from joining or remaining members of employer organizations. 29 U.S.C. §104(b) (1994). In 1947, Congress refused to restrict multiemployer bargaining because it "was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *NLRB v. Truck Drivers Local 449 ("Buffalo Linen")*, 353 U.S. 87, 95 (1957).[7]

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[6] While these new terms are unilaterally formulated by the employer, they are not unilaterally imposed, since these new terms are not binding until accepted by the employees, who, of course, are free to reject the proffered terms by refusing to work. *See infra* pp. 21-22.

[7] Multiemployer bargaining enables employers to form a common front in collective bargaining negotiations, eliminate competitive disadvantages that would flow from the absence of uniform employment terms, and engage in concerted lockouts both to advance their common collective bargaining goals and to defend against union whipsawing. *See Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 409-10 & n.3 (1982).

Labor Exemption

Reconciliation of conflicts that might arise between federal antitrust and federal labor policies required the development of statutory and "nonstatutory" labor exemptions to the antitrust laws.

1. **Statutory Exemption**

Both the Clayton Act and the Norris-LaGuardia Act are the source of the statutory exemption, *see H. A. Artists & Associates, Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 715 (1981) (citing *United States v. Hutcheson*, 312 U.S. 219, 236 (1941)),[8] and both are part of the fabric of national labor legislation upon which rests the development of the "nonstatutory" exemption as well — a fact petitioners readily admit. *See* Petitioners' Brief at 18.

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[8] Sections 6 and 20 of the Clayton Act, *see* 15 U.S.C. § 17 (1994); 29 U.S.C. § 52 (1994), constitute the primordial version of the statutory labor exemption. The Court in *Hutcheson* recounted that "[t]his statute was the fruit of unceasing agitation, which extended over more than twenty years, and was designed to equalize before the law the position of workingmen and employer as industrial combatants." *Hutcheson*, 312 U.S. at 229 (quoting *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 484 (1921)(Brandeis, J., dissenting)). Section 6 of the Clayton Act declared that "[t]he labor of a human being is not a commodity or article of commerce" within the meaning of the antitrust laws and disallowed the use of the antitrust laws to outlaw labor unions. Section 20 of the Clayton Act removed certain legitimate activities in labor disputes from interdiction by the antitrust laws and "also relieved such practices of all illegal taint by the catch-all provision, 'nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.'" *Id.* at 230. Restrictive interpretations of the scope of this first labor exemption, *see, e.g., Duplex Printing, supra; Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37 (1927), sparked further discord that eventually led to the adoption in 1932 of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1994), which expanded the statutory exemption by proscribing the issuance of injunctions in virtually all labor disputes. *Hutcheson*, 312 U.S. at 230-31.

A misconception has arisen that the statutory labor exemption is a shield for labor unions alone. *See* Petitioners' Brief at 19; *Amicus* Brief For United States at 12; *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1048 (D.C. Cir. 1995); *id.* at 1062 (Wald, J., dissenting). While it is true that this Court has invoked the statutory labor exemption to immunize from antitrust liability unilateral union activities involving or growing out of a labor dispute, *see H. A. Artists*, 451 U.S. at 714-15; *Hutcheson*, 312 U.S. at 232, and has refused to extend the statutory exemption to "concerted action or agreements between unions and nonlabor parties," *see Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 622 (1975), the Court has never ruled that the statutory exemption is exclusively a unions' preserve simply because it has never until this case confronted the question whether unilateral multiemployer activities involving or growing out of a labor dispute enjoy the safeguards of the statutory labor exemption.[9]

[9] The comment in *H. A. Artists* that "a party seeking refuge in the statutory exemption must be a bona fide labor organization, and not an independent contractor or entrepreneur," *see* 451 U.S. at 717 n.20 (citing *Los Angeles Meat Drivers Local 626 v. United States*, 371 U.S. 94 (1962), and *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942)), does not answer the question. The comment when read in context footnoted the proposition in the main text of the opinion that the threshold question in any statutory exemption case is whether the challenged conduct involves any combination between union and nonlabor groups — a debilitating condition that would cause the statutory exemption to evaporate. The comment has no bearing on the question whether unilateral multiemployer activities arising out of collective bargaining or other labor disputes enjoy the protections of the statutory exemption. The comment simply reaffirms the settled principle that the statutory exemption does not apply to bilateral activities involving concerted actions or agreements and combinations between unions and nonlabor groups. *Connell*, 421 U.S. at 622; *H. A. Artists*, 451 U.S. at 715 (citing *Hutcheson*, 312 U.S. at 232). In *H. A. Artists* the statutory exemption applied because those theatrical agents with whom the union combined were found not to constitute a nonlabor group because of the economic interrelationship that affected legitimate union interests. *Id.* at 721-22. The same result was not forthcoming in the two cases cited in the *H. A. Artists* footnote. In *Meat Drivers* a union admitted to membership

The Clayton and the Norris-LaGuardia Acts do not foreclose employers from the statutory labor exemption. Indeed, they expressly embrace unilateral multiemployer activities involving collective bargaining or other labor disputes. The protected activities under these labor statutes are not those of labor unions alone but of persons participating or interested in a labor dispute, whom the Clayton Act broadly defines to include foreign and domestic "corporations and associations," *see* 29 U.S.C. § 53 (1994), and whom the Norris-LaGuardia Act specifically defines to be a person or association "engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is *a member*, officer, or agent *of any association composed* in whole or in part *of employers* or employees engaged in such industry, trade, craft, or occupation," *see* 29 U.S.C. § 113(b) (1994) (emphasis added).

The list of protected activities in both statutes contains conduct that employers in a multiemployer bargaining unit customarily engage in "singly or in concert" in connection with collective bargaining or other labor disputes: "terminating any relation of employment," "ceasing . . . to employ any party to such dispute," "[c]easing or refusing . . . to remain in any relation of employment," "[b]ecoming or remaining a member of . . . any employer organization," "[p]aying or giving to, or withholding from, any person participating or interested in such labor dispute . . . moneys or things of value," "[g]iving publicity to the existence of, or the facts involved in, any labor dispute,"

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and then combined with a nonlabor group of self-employed grease peddlers to suppress and eliminate the peddlers' competitors. In *Columbia River Packers* a group of commercial fishermen calling themselves a "union" combined to fix the terms of contracts for the sale of fish so that any purchaser would have to buy exclusively from members of the bogus "union." In both cases the statutory exemption was unavailing to excuse from antitrust liability an anticompetitive combination involving nonlabor participants and having nothing to do with any labor dispute or legitimate union objective.

"[a]ssembling peaceably to act or to organize to act in promotion of their interests in a labor dispute," and "[a]greeing with other persons to do or not to do any of the acts heretofore specified." *See* 29 U.S.C. §§ 52, 104 (1994). Section 5 of the Norris-LaGuardia Act, 29 U.S.C. § 105 (1994), makes it clear that persons participating or interested in a labor dispute do not constitute or engage in an unlawful combination or conspiracy because of their concerted recourse to these protected activities.

Lockouts by employers in a multiemployer unit are cessations or refusals to employ or remain in an employment relationship. Permanent replacement of economic strikers by members of a multiemployer group is a termination of an employment relationship. Management caucuses among members of a multiemployer group are assemblies to promote their common interests in a labor dispute. Formulating and presenting multiemployer bargaining positions — indeed, the unilateral post-impasse implementation of terms and conditions of employment, like the fixed wage scale for developmental squad members at issue in this case — are agreements to pay or withhold monies or things of value from persons participating or interested in a labor dispute as well as agreements among employers to act in promotion of their common interests in a labor dispute.

The unilateral employer activity challenged in this case falls within the statutory exemption formed by the interplay of the Clayton and Norris-LaGuardia Acts. Certainly, the express terms of these statutes do not warrant its exclusion, since they bar any court from enjoining this protected activity. "[T]hat which on the equity side of the court is allowable conduct" hardly qualifies as the basis for the imposition of onerous treble damages on the law side of the court. *Cf. Hutcheson*, 312 U.S. at 235 (drawing the same conclusion when the anomaly involves a court's equity and criminal jurisdictions). "That is not the way to read the will of Congress, particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a

series of enactments touching one of the most sensitive national problems." *Id.* at 235. More importantly, the Clayton Act itself expressly "removes all such allowable conduct from the taint of being a 'violation of any law of the United States,' including the Sherman Law." *Id.* at 236.

All that can be said to justify the exclusion of employers' collective bargaining activities from the protections of the statutory exemption is that labor unions, not management, provided the lobbying catalyst that sparked the exemption's adoption. *See, e.g.,* James M. Altman, *Antitrust: A New Tool For Organized Labor?,* 131 U. PA. L. REV. 127, 142-47 (1982). This is hardly a revealing diagnostic tool of statutory construction. The proponent of legislation is not necessarily its sole beneficiary. It may be true that Congress's immediate objective was to prevent misuse of the antitrust laws to disband labor unions or suppress their legitimate activities. But the plain language of the statutory exemption reveals a much broader congressional policy concerning the appropriate role of antitrust law in regulating relations between workers and their employers that transcends the exemption's immediate goal.

The declared public policy of the Norris-LaGuardia Act[10] confirmed Justice Brandeis's prior finding that the statutory exemption enacted in the Clayton Act "was designed to equalize before the law the position of workingmen and employer as industrial combatants." *Duplex Printing,* 254 U.S. at 484 (Brandeis, J., dissenting). The inclusion in the list of protected activities contained both in § 20 of the Clayton Act, 29 U.S.C. § 52 (1994), and in § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 (1994), of conduct ordinarily engaged in by employers, whether singly or in concert, to resolve collective bargaining and

[10] This policy recognizes the need to balance the bargaining rights of employers and employees by bestowing upon individual workers the same rights enjoyed by employers to associate, to designate bargaining representatives, and to engage in other concerted activities for the purpose of collective bargaining or other mutual protection. 29 U.S.C. § 102 (1994).

other labor disputes demonstrates Congress's deliberate choice to remove from regulation under the antitrust laws legitimate actions taken by employers in disputes with their workers.[11] The statutory exemption embodied the judgment of Congress that

[11] The Government's suggestion, *see Amicus* Brief of United States at 12 n.4, echoed by the petitioners, *see* Petitioners' Brief at 24-25, 30, that *Anderson v. Shipowners Ass'n*, 272 U.S. 359 (1926), and *Radovich v. National Football League*, 352 U.S. 445 (1957), conclusively bar employers' access to the protections of the statutory exemption reads too much into these authorities. There were no labor considerations at work in either case: no collective bargaining relationship, no multiemployer bargaining association, no labor union, no labor dispute. *Radovich* provides no insight into the parameters of the statutory labor exemption, which was not at issue because of the absence of any of the protected activities that would warrant its invocation. The lessons of *Radovich* are purely of an antitrust nature: the special exemption enjoyed by professional baseball does not extend to the business of professional football, *see* 352 U.S. at 451, and the blacklisting of players from a rival league for the purpose of monopolizing that business market by destroying the competing league is actionable under the antitrust laws, *see* 352 U.S. at 448-49, 453-54. The issue in *Anderson* concerned the definition of commerce for the purpose of triggering application of the antitrust laws. Since the challenged restraint, which did not arise in a collective bargaining context, involved the employment of seamen on ships that are instrumentalities of interstate and foreign commerce, the effect on commerce in the *Anderson* Court's view was so direct and primary as to rule out any suggestion that the antitrust laws did not apply. 272 U.S. at 364-65. Because of this fixation on the commerce issue, the Court was able to rule out any need to consider other case law then extant involving labor considerations because those cases arose in local industries having only an indirect, incidental, and secondary effect on commerce. 272 U.S. at 363-64. Although the shipowners raised the issue, whether regulation of employment falls within the ambit of the antitrust laws, the *Anderson* Court considered that question to be irrelevant. 272 U.S. at 363. As a result, the Court never examined the provisions of §§ 6 and 20 of the Clayton Act, the only statutory labor exemption then in existence, since *Anderson* arose prior to the enactment of the Norris-LaGuardia Act. Recourse to *Anderson* is dangerously misleading and heedless of Justice Frankfurter's admonition that "[t]here is no profit in discussing those cases under the Clayton Act which were decided before the courts were furnished the light shed by the Norris-LaGuardia Act on the nature of the industrial conflict." *Hutcheson*, 312 U.S. at 236.

labor disputes are an "area of economic conflict that had best be left to economic forces and the pressure of public opinion and not subjected to the judgment of courts." *Hutcheson*, 312 U.S. at 231 (citation omitted).

2. **"Nonstatutory Exemption"**

Implicit in the scope and comprehensiveness of the legislative scheme of federal labor law is a "nonstatutory labor exemption" that is necessary for "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets." *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 622 (1975). This "nonstatutory labor exemption" augments the statutory labor exemption by extending the exemptive shield to concerted actions and agreements between unions and nonlabor groups. *Id.* at 622-23.[12]

An agreement between employers and employees concerning terms and conditions of employment applicable to the immediate bargaining unit's labor market that has only an incidental, not a direct, effect on the business market that is no broader than necessary to effectuate the agreement's legitimate labor objectives is entitled to the protections of the "nonstatutory exemption." *Local 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 689-91 (1965). The exemption is forfeited, however, when the parties include in their agreement: (1) monopolistic provisions controlling the business market, *see Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 808 (1945); (2) requirements for the union to impose the same contractual labor conditions on other bargaining units, *see United Mine Workers v. Pennington*, 381

[12] We refer to the "nonstatutory labor exemption" as "so-called" and place the term in quotation marks in order to refer to it not as a separate exemption but rather the logical extension of congressional will embodied in the entire regime of national labor law, including the Clayton, Norris-LaGuardia, Wagner, and Taft-Hartley Acts, to keep the antitrust laws out of the collective bargaining process.

U.S. 657, 664-65 (1965); or (3) acquiescence by the employer to the union's demand for the boycotting of nonunion firms, which has a direct and immediate anticompetitive impact on the business market by excluding competitors from a portion of that market, *see Connell,* 421 U.S. at 623-25.

Until this case this Court's labor exemption jurisprudence had never explored the appropriate parameters of the exemption when the antitrust assault is mounted by one of the collective bargaining parties against the other's negotiating activities. Neither the petitioners nor any of the *amici* supporting them, including the United States, advocates unfettered application of the antitrust laws to disputes arising within the collective bargaining theater. They all agree that the exemption should play a role but insist that it leave the stage before the final act and even then disagree among themselves as to the proper time for its departure. Petitioners would banish the exemption as soon as the prior collective bargaining agreement expires. *See* Petitioners' Brief at 45. The United States would keep it on the stage at least until an impasse has been reached, and perhaps even longer. *See Amicus* Brief of United States at 17, 18 n.5.

3. No "Consent" Requirement For Labor Exemption

The underlying premise for all of these putative temporal limitations on the application of the exemption is the invalid notion that the *sine qua non* for the exemption is the employees' consent as manifested in their union's subscription to a collective bargaining agreement. Consent is not an essential prerequisite for application of the exemption; all that is required is that the activity be part of the collective bargaining process and not violate the labor laws. Even if consent were necessary, it is always present in a strike-free collective bargaining environment.

The only authority proffered by the petitioners and their *amici* colleagues for their putative consent formulation is this Court's prior acknowledgment that agreements between

employers and employees may under appropriate circumstances be safeguarded from antitrust challenge by the "nonstatutory exemption." *Connell*, 421 U.S. at 622; *Jewel Tea*, 381 U.S. at 688-91. It does not follow, however, that the inclusion of the agreement itself within the exemption operates to exclude all other collective bargaining activities or to insinuate by inference a consent element into the exemption formula. While it is true that this Court has ruled that labor-management agreements may qualify for the "nonstatutory exemption," it has never indicated that the union's consent is the qualifying factor or that the exemption is confined only to the collective bargaining agreement itself.[13]

Consent is hardly a worthy candidate for an antitrust exemption recipe, for it is usually consent that triggers antitrust concerns. Indeed, Sherman Act § 1 outlaws anticompetitive restraints that are the product of agreements or other concerted undertakings. 15 U.S.C. § 1 (1994). It is a cardinal principle of antitrust law that the consent of one party to an anticompetitive contract does not preclude that party from seeking antitrust remedies from the other contracting parties. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139-40 (1968) (*in pari delicto* doctrine is not a valid defense to an antitrust action). Moreover, consent was never considered a relevant factor in Congress's adoption of the statutory labor exemption. A consent requirement, therefore, is conceptually incompatible with fundamental antitrust principles.

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[13] Congress itself has not considered union consent to be a necessary ingredient for a labor exemption. In a related context Congress adopted a labor exemption from federal shipping law not only for the collective bargaining agreement itself but also for "agreement[s] preparatory to such a collective-bargaining agreement among members of a multiemployer bargaining group." *See* 46 U.S.C. app. § 1702 (16) (1988) (defining what maritime labor agreements are entitled to the labor exemption from federal shipping law prescribed in 46 U.S.C. app. § 1704(e) (1988)); *see also Council of N. Atlantic Shipping Ass'ns v. FMC*, 672 F.2d 171 (D.C. Cir.), *cert. denied*, 459 U.S. 830 (1982).

From a labor law standpoint, the putative consent requirement is a red herring. Multiemployer bargaining is consensual and cannot take place without the assent of the union. *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982); *NLRB v. Beckham, Inc.*, 564 F.2d 190, 192 (5th Cir. 1977); *NLRB v. Hart*, 453 F.2d 215, 217 (9th Cir. 1971), *cert. denied*, 409 U.S. 844 (1972). By agreeing to a multiemployer bargaining format the employees' union representative agrees to accept whatever rights federal labor law bestows upon the multiemployer group, including the employers' right to engage in any bargaining activities permissible under that statutory scheme.

The employer-employee relationship itself is also quintessentially contractual in nature. When a multiemployer collective bargaining agreement is in effect, the terms of that agreement define the contractual relationship between the employers and their workers. When that agreement expires, the employees have several rights: they can strike, they can go to work without a collective bargaining agreement, they can seek to decertify their union, or they can petition to clarify the bargaining unit. If they decide to work, their performance of services is a tacit acceptance of the terms of employment unilaterally offered by the employers. While negotiations are in progress and no impasse has occurred, the employers' right to fix the terms of employment is restricted by the obligation imposed by federal labor law to continue in effect the terms of the expired contract that relate to mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Impasse may bring that interim contractual arrangement to an end, but it does not alter the basic structure of the contractual relationship. The employers are then free to alter their offer subject only to the federal labor law requirement that the changes in the *status quo* are reasonably comprehended within the employers' pre-impasse proposals. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n. 5 (1988). Whether the new offer is accepted depends entirely upon the employees. By continuing to

work, the employees and their union representative manifest their acceptance of the employers' offer, and a contract results that fixes the terms of employment on an interim basis until the collective bargaining process produces a final agreement. *United Paperworkers Int'l Union v. International Paper Co.*, 920 F.2d 852, 855-59 (11th Cir. 1991); *United Paperworkers Int'l Union v. Wells Badger Indus., Inc.*, 835 F.2d 701, 704 (7th Cir. 1987).[14]

In a strike-free or lockout-free environment a contract is always in place. To suggest otherwise would require a repudiation of settled principles of contract law that would defy reality and introduce into the labor exemption equation an element that has no basis in law or in fact. Once the artificiality of the proposed consent requirement is exposed, the "nonstatutory" exemption analysis can be properly focused on the harmonization of the underlying policies of federal labor law and federal antitrust law. A

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[14] In this case all of the practice squad players comprising the petitioner class signed individual written contracts agreeing to the uniform salary scale, which were to be superseded, of course, by new individually negotiated contracts for any practice players called up to regular team status. The players' union took no strike action presumably because of the antipathy of star players and other regular team members for their practice squad brethren, *see* Petitioners Brief at 42, not an unusual occurrence in large heterogeneous bargaining units composed of workers with divergent interests. This lack of intraunion solidarity hardly justifies enhancing the bargaining strength of the practice players' segment of the bargaining unit by giving them an antitrust weapon. The practice players' lack of bargaining leverage is due not to the lack of antitrust remedies but rather to a lack of support within their own union. Their remedy lies within their own union or in the labor laws, not in the antitrust laws. Their labor law remedies are not limited to decertification, as petitioners suggest, *see id.* at 42. The practice players may file unfair labor practice charges with the NLRB if the employers fail to bargain in good faith after impasse. These players may also petition the NLRB for unit clarification or readjustment to establish their own separate unit, where they would not be at the mercy of unsympathetic union members. *See, e.g., Lakeshore Manor, Inc.*, 225 N.L.R.B. 908 (1976); NLRB RULES & REGULATIONS, 29 C.F.R. §§ 102.60(b), 102.61(d), 102.63(b) (1995); NLRB CASEHANDLING MANUAL, pt. 2, at ¶¶ 11480-11498 (1989).

proper accommodation of these policies implicates the very same considerations that informed the statutory exemption analysis.

Labor law provides both the rules and the remedies for regulation of the collective bargaining process. These labor law devices establish the groundrules for the negotiating process but do not interfere with the bargaining freedom of both employers and employees. To allow employees during the course of collective bargaining to resort to the antitrust laws would enable federal courts to impinge upon employers' bargaining freedom by passing judgment under the antitrust laws on the reasonableness of their substantive bargaining proposals,[15] thus subverting the fundamental tenets of national labor policy — governmental neutrality and equality of bargaining power. The courts, not the parties, would dictate the substantive terms of the bargain, and the disparity of treatment would upset the balance of bargaining power by subjecting only employers to the risk of treble damage penalties because a federal court might disagree with bargaining proposals they had every right under federal labor law to pursue. This intrusion of antitrust law into the collective bargaining process would not advance any genuine antitrust interests, since collective bargaining on employment conditions in the immediate bargaining unit does not unduly affect the employers' business market, the area of antitrust law concern. Every element warranting application of the "nonstatutory" labor exemption is present in this case.

Longshore Multiemployer Bargaining

Multiemployer bargaining has been the traditional format for labor relations and negotiations in the longshore industry. *NLRB v. Truck Drivers Local 449 ("Buffalo Linen")*, 353 U.S. 87, 94 (1957). Ships calling at United States ports are owned and operated by numerous United States and foreign ocean carriers. In

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[15] In most industries most if not all multiemployer activities could be considered horizontal restraints and therefore *per se* violations of the antitrust laws. *See infra* p. 25.

each United States port there are many stevedoring companies and terminal operators. In every port there is a pool of longshore employees who work for different stevedoring companies and terminal operators day-to-day, handling the vessels of various ocean carriers calling at the port. The longshore industry is highly competitive. Of the 50 or so stevedores in operation in the Port of New York in 1956, *see New York Shipping Ass'n*, 116 N.L.R.B. 1183 (1956), only three survive to this day. As employers depart, others enter the industry to take their place.

A multiemployer bargaining format is the only effective method for negotiating labor contracts in the longshore industry. The employers need to band together as a defense against potential union whipsawing tactics. By the same token, multiemployer bargaining is essential for longshore employees as well, to prevent their employers from playing one port off against another. After all, ships are essentially movable plants which can be dispatched to those ports offering better economic packages. Moreover, without multiemployer bargaining pension, healthcare, welfare, and other employee benefits would likely be unavailable. The peripatetic, part-time nature of longshore employment with limited service for each individual employer would prevent employees from having adequate service credit to qualify for coverage under any single employer plan. So, too, individual employers would not have the economic wherewithal to offer benefit packages comparable to those that can be furnished by multiemployer plans.[16]

Allowing antitrust law to come into play in multiemployer collective bargaining would engender Kafkaesque consequences. If, as petitioners advocate, the demise of the labor exemption is coterminous with the expiration of the prior collective bargaining agreement, the employer-members of a multiemployer group would face the prospect of antitrust liability from the get-go for

[16] Multiemployer and multiport benefit plans with aggregate assets totaling in the billions of dollars prevail in the longshore industry in the United States.

doing that which federal labor law mandates — continuing in effect the terms of the expired contract. The formulation proposed by the United States, which would allow the exemption to linger on until impasse, fares no better. In a national emergency, after impasse has already occurred, the members of a multiemployer bargaining group would be exposed to antitrust liability for composing the last offer the Taft-Hartley Act demands.[17] Even in the absence of a national emergency, a multiemployer lockout at impasse could be challenged as an anticompetitive "group boycott" and, as in this case, post-impasse implementation of employment terms encompassed within pre-impasse proposals as unlawful "price fixing." If the formulation advanced by petitioners and their *amici* supporters were to prevail, what labor law requires or permits, *see Katz*, 369 U.S. at 743 (pre-impasse maintenance of prior contract's terms required); *Buffalo Linen*, 353 U.S. at 95-96 (lockout permissible); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965) (same); *Laborers Health*, 484 U.S. at 543 n.5 (post-impasse unilateral changes permissible), antitrust law would taketh away.

Inviting antitrust law to the bargaining table would sound the death knell of multiemployer bargaining.[18] The practical

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[17] The national emergency provisions of the Taft-Hartley Act, 29 U.S.C. §§ 171-183 (1994), require employers to formulate unilaterally a last offer to be presented by the NLRB to the striking employees for secret ballot vote to facilitate settlement. *See* 29 U.S.C. §§ 179, 180 (1994).

[18] Petitioners predict that the absence of the labor exemption for post-impasse implementation of employment terms by employer associations is unlikely to spawn antitrust challenges in more traditional multiemployer bargaining units because of the acceptance by both sides of the legitimacy of common terms for all employees. *See* Petitioners' Brief at 39. This allegation is not supported by any fact or authority, and the alleged reason given is a *non-sequitur*. It is unlikely that labor unions would forego the opportunity to use the antitrust weapon to improve their bargaining leverage to obtain better terms, even if they are to be common employment terms. The absence of antitrust challenges in the past is indicative not of unions' timidity but rather of their recognition that multiemployer collective bargaining activities are exempt from the antitrust laws. Certainly, any acceptance of

consequences would be devastating. Heightened union intransigence at the multiemployer bargaining table would not be unexpected, since the inevitable impasse would trigger antitrust remedies that would shift the balance of bargaining power decidedly in labor's favor. Employers would be reluctant to establish multiemployer bargaining units in the first place if they know that doing so would inevitably result in their exposure to antitrust liability. Ocean carriers, which are usually not the longshore workers' common law employers, acquire employer status and its concomitant obligations by virtue of their participation in multiemployer collective bargaining and their assumption of the obligation to contribute to multiemployer longshore employee benefit plans. *See, e.g., Korea Shipping Corp. v. NYSA-ILA Pension Trust Fund*, 880 F.2d 1531 (2d Cir. 1989); *Philippines, Micronesia & Orient Navigation Co. v. NYSA-ILA Pension Trust Fund*, 909 F.2d 39 (2d Cir.), *cert. denied*, 498 U.S. 983 (1990). Their withdrawal from multiemployer bargaining would undermine the financial stability of many longshore employee benefit plans.

The intrusion of antitrust law into the bargaining arena would also have a destabilizing impact upon the authority of both bargaining agents. Any employer-member of the multiemployer group who disagrees with a post-impasse bargaining proposal could repair to an antitrust court to challenge the proposal. A disgruntled employee or dissident faction within the union would have similar leverage to upset the bargaining process. An industry, like the longshore industry, with hundreds of employers and thousands of employees is a fertile ground of potential litigants.

The suggestion of petitioners and the United States that antitrust law is not disruptive because the employers at impasse could individually implement unilateral terms or negotiate

petitioners' narrow exemption would generate either significant numbers of antitrust suits or litigation threats designed to coerce concessions employers would not otherwise make.

individual interim agreements, *see* Petitioners' Brief at 40; *Amicus* Brief of United States at 17-18, is as unrealistic as "extracting sunbeams out of cucumbers." JONATHAN SWIFT, GULLIVER'S TRAVELS, A VOYAGE TO LAPUTA, ch. 5 (1726), *reprinted in* THE COMPLETE WORKS OF JONATHAN SWIFT, at 186 (Roslyn, New York: Black's Readers Service, 1932). Interim agreements in the longshore industry would number in the hundreds, and any variations in contribution rates or benefit levels would seriously impair the administration and actuarial soundness of existing multiemployer employee benefit plans. Employers acting individually in unilaterally implementing employment terms are constrained under labor law to conform the terms to pre-impasse proposals, all of which were the product of multiemployer collaboration. The employers, even though acting individually, would still run the risk of antitrust claims based on allegedly consciously parallel action if their offers mirrored, as they must, pre-impasse proposals. Thus, the antitrust sword would still hang over the heads of the employers even were they to act individually. With the multiemployer unit fragmented, individual employers would be ripe for union whipsawing with any defensive multiemployer lockout also open to antitrust challenge as a group boycott. Under these circumstances the inevitable result would be employer capitulation — hardly the give and take of collective bargaining intended by Congress. *National Basketball Ass'n v. Williams*, 45 F.3d 684, 693 (2d Cir. 1995), *petition for cert. pending*, No. 95-137 (U.S. filed July 24, 1995).

What is particularly mischievous about the formulation advocated by petitioners and their *amici* colleagues is the lack of any compelling antitrust interests that it would advance. Collective bargaining is confined to employment terms in the labor market and raises no threat of any untoward anticompetitive restraint on the employers' product market. Neither petitioners nor any of their *amici*, including the United States, would condemn the challenged fixed salary for developmental squad players if it had received the union's approbation. Indeed, before the

court of appeals petitioners conceded that the fixed salary had no effect on the business market of professional football. *See Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1057 & n.8 (D.C. Cir. 1995). Absent genuine antitrust considerations all that remains is the use of the antitrust law as a cat's-paw to tinker with settled labor law regulation of the bargaining process to enhance the bargaining leverage of unions or of segments of unionized bargaining units. It is no wonder, then, that the court of appeals in this case and every other court of appeals that has confronted petitioners' formulation has rejected it.[19]

The rule of decision of the court of appeals in this case, whether tested against the explicit provisions of the statutory labor exemption or against the settled principles of the "nonstatutory" labor exemption, is a valid statement of the controlling law: collective bargaining activities of multiemployer groups that are lawful under federal labor law and that affect only employment conditions in the immediate bargaining unit are exempt from challenge under the antitrust laws at all stages of the collective bargaining process. *See Bonanno Linen*, 454 U.S. at 412 ("As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'"). This rule of law properly promotes national labor policy without frustrating national antitrust policy and preserves the continued viability of multiemployer bargaining in the United States.

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[19] *Brown v. Pro Football, Inc.*, 50 F.3d 1041 (D.C. Cir. 1995); *National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995), *petition for cert. pending*, No. 95-137 (U.S. filed July 24, 1995); *Powell v. National Football League ("Powell II")*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

Conclusion

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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Respectfully submitted,

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